# Abdul Ghani bin Ali @ Ahmad & Ors v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEALS NO 05–10 OF 2000(W) AND NO 05–11 OF 2000(W)

MOHAMED DZAIDDIN CHIEF JUSTICE, WAN ADNAN CJ (MALAYA), STEVE SHIM CJ (SABAH & SARAWAK), ABDUL MALEK AHMAD AND AHMAD FAIRUZ FCJJ

19 JULY 2001

***Constitutional Law*** *— Emergency proclamation — Validity of — Whether Proclamation of Emergency by Yang di-Pertuan Agong on 15 May 1969 invalid — Whether Yang di-Pertuan Agong acted on advice of Cabinet as required by art 40(1) of the Federal Constitution in making the Proclamation — Whether Emergency (Essential Powers) Act 1979 which arose from Proclamation invalid — Whether Essential (Security Cases) (Amendment) Regulations 1975 retrospectively validated by Emergency (Essential Powers) Act 1979 invalid and unconstitutional — Federal Constitution art 40(1) — Emergency (Essential Powers) Act 1979 — Essential (Security Cases) (Amendment) Regulations 1975*

***Criminal Procedure*** *— Trial — Security offences — Issue of certificate declaring security case — Attorney General issued certificate under reg 2(2) of Essential (Security Cases) (Amendment) Regulations 1975 declaring appellants' case as security case — Whether Attorney General's decision to issue certificate in absence of de facto emergency unlawful — Essential (Security Cases) (Amendment) Regulations 1975 reg 2(2)*

***Constitutional Law*** *— Equal protection of the law — Validity of legislation — Whether Essential (Security Cases) (Amendment) Regulations 1975 when used against ordinary citizens violated arts 5 and 8 of Federal Constitution — Whether trial under Essential (Security Cases) (Amendment) Regulations 1975 invalid and unconstitutional — Meaning of art 8 of Federal Constitution — Federal Constitution arts 5, 8 — Essential (Security Cases) (Amendment) Regulations 1975 regs 2(2), 26*

***Criminal Procedure*** *— Trial — Security offences — Failure to supply record of proceedings — Appellants committed for trial under Essential (Security Cases) (Amendment) Regulations 1975 — Provision in reg 6(2) for right of accused to be supplied with record of proceedings — Non-compliance with reg 6(2) before trial — Whether non-compliance rendered committal of appellants unlawful and trial under Essential (Security Cases) (Amendment) Regulations 1975 invalid — Whether injustice occasioned to appellants as result of non-compliance — Essential (Security Cases) (Amendment) Regulations 1975 reg 6(2)*

These two appeals were from the decision of the trial judge dismissing the preliminary objections raised by the appellants in the High Court below, where they were charged with waging war against the Yang di-Pertuan Agong, an offence punishable under s 121 of the Penal Code. The first appeal raised the following issues: (i) whether the Essential (Security Cases) (Amendment) Regulations 1975 ('ESCAR') was invalid and unconstitutional, thereby resulting in the trial under ESCAR being invalid and unconstitutional; (ii) whether the decision of the Attorney General to issue a certificate under reg 2(2) of ESCAR (declaring the appellants' case as a security case) in the absence of a

de facto emergency was unlawful and, hence, void; and (iii) whether the trial under ESCAR was invalid for non-compliance with reg 6(2) of ESCAR, in the failure to supply the record of proceedings to the appellants before the trial. The second appeal raised the issue of whether the Proclamation of Emergency by the Yang di-Pertuan Agong on 15 May 1969 was invalid on the ground that the Yang di-Pertuan Agong did not act on the advice of the Cabinet as required by art 40(1) of the Federal Constitution ('the Constitution'), which would have resulted in the Emergency (Essential Powers) Act 1979, enacted by virtue of the Proclamation and which resurrected ESCAR, being unconstitutional and invalid, thus rendering ESCAR invalid and unconstitutional, leading to the trial of the appellants under ESCAR being a nullity.

**Held**, dismissing the appeals:

(1) (Per **Mohamed Dzaiddin Chief Justice**, **Abdul Malek Ahmad** and **Ahmad Fairuz FCJJ** concurring) With regard to non-compliance with reg 6(2) of ESCAR, although reg 6(2) provided for the right of the accused to be supplied with the record of proceedings, non-compliance with that provision should not, in itself, be taken to nullify the whole trial having regard to the justice of the case. In this case, no injustice had been occasioned because from the notes of evidence, the trial judge had, in fact, ordered that the record of proceedings of the committing magistrate be given to counsel before the commencement of the trial before him (see p 569A–B).

(2) (Per Abdul Malek Ahmad FCJ, Mohamed Dzaiddin Chief Justice and **Ahmad Fairuz FCJ** concurring) The decision of the Attorney General to issue a certificate under reg 2(2) of ESCAR was based on the pure judgment of the Attorney General which could not be subjected to an objective test and was not accordingly amenable to judicial review, as held by the Federal Court in *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68. Although that case involved a motion for an order of certiorari, the same principle was applicable in this case, irrespective of whether there was a de facto emergency or otherwise (see p 581G–I); *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68 followed.

(3) (Per **Ahmad Fairuz FCJ**, **Mohamed Dzaiddin Chief Justice** and **Abdul Malek Ahmad FCJ** concurring) The contention of counsel for the appellants in the first appeal that ESCAR, when used against ordinary citizens, infringed arts 5 and 8 of the Constitution and was discriminatory and, therefore, unconstitutional, was in relation to art 8, without merit. The senior deputy public prosecutor's arguments that art 8's equality provision was not absolute, that ESCAR was applicable to all persons who committed security offences and that even if it was discriminatory it was nonetheless lawful being based on

classification, were supported by the case of *Datuk Haji Harun bin Haji Idris v PP* [1977] 2 MLJ 155, where the Federal Court held that art 8 did not mean that all laws had to 'apply uniformly to all persons in all circumstances everywhere'. Thus, as ESCAR operated alike on all persons under like circumstances (ie people who committed security offences), reg 2(2) of ESCAR clearly provided the guideline as to the class of cases in which ESCAR was to be resorted to and reg 26 of ESCAR provided for appeals to a higher authority so that trial court decisions are always open for review, ESCAR could not, in the circumstances, be unconstitutional and invalid (see pp 593I–594B, 596E); *Datuk Haji Harun bin Haji Idris v PP* [1977] 2 MLJ 155 followed. As for ESCAR's purported infringement of art 5 of the Constitution, the parties did not address the issue of how it was infringed and, in the circumstances of the appeals, ESCAR could not have been said to have infringed that article (see pp 596G).

(4) Counsel for the appellants in the second appeal had conceded that the promulgation of the Proclamation of Emergency on 15 May 1969 was made by the Yang di-Pertuan Agong after acting on the advice of the Cabinet (see p 599B). This concession, along with the reasonings set out in the Indian cases cited (Indian Supreme Court judgments being of persuasive value in Malaysia, particularly on the Constitution), was indicative of the fact that, contrary to counsel's prior contention, a caretaker government could exist under the Constitution and did, in fact, exist on 15 May 1969. In the circumstances, the 15 May 1969 Proclamation of Emergency could not have been unconstitutional and invalid (see p 600F–H); *Madan Murari v Choudhuri Charan Singh* AIR 1980 Cal 95 and *UNR Rao v Indira Ghandi* AIR 1971 SC 1002 followed.

(5) The Emergency (Essential Powers) Act 1979 was enacted by Parliament with retrospective effect and s 9(1) clearly validated ESCAR, as held by the Federal Court in *Teh Cheng Poh v PP* [1979] 2 MLJ 238. In the circumstances, the contention that ESCAR was not valid and unconstitutional did not have any merit (see pp 601H–I, 602B).

**[Bahasa Malaysia summary**

Kedua-dua rayuan ini adalah daripada keputusan hakim perbicaraan yang menolak bantahan-bantahan awal yang ditimbulkan oleh perayu-perayu di Mahkamah Tinggi, di mana mereka telah dituduh melancarkan perang terhadap Yang di-Pertuan Agong, satu kesalahan yang boleh dihukum di bawah s 121 Kanun Keseksaan. Rayuan pertama menimbulkan persoalan-persoalan berikut: (i) sama ada Peraturan-Peraturan Perlu (Kes-kes Keselamatan) (Pindaan) 1975 ('ESCAR') adalah tidak sah dan tidak berperlembagaan; (ii) sama ada keputusan Peguam Negara untuk mengeluarkan sijil di bawah

peraturan 2(2) ESCAR (mengisytiharkan kes perayu-perayu sebagai satu kes keselamatan) dengan ketidakhadiran satu darurat de facto adalah salah di sisi undang-undang dan, oleh itu, batal; dan (iii) sama ada perbicaraan di bawah ESCAR adalah tidak sah kerana ketidakpatuhan dengan peraturan 6(2) ESCAR, kerana kegagalan untuk menyediakan rekod prosiding kepada perayu-perayu sebelum perbicaraan. Rayuan kedua menimbulkan persoalan sama ada Pengisytiharan Darurat oleh Yang di-Pertuan Agong pada 15 Mei 1969 adalah tidak sah atas alasan bahawa Yang di-Pertuan Agong tidak bertindak atas nasihat Kabinet sebagaimana yang dikehendaki oleh perkara 40(1) Perlembagaan Persekutuan ('Perlembagaan tersebut'), yang mungkin telah mengakibatkan Akta Darurat (Kuasa-kuasa Perlu) 1979, yang digubal menurut Pengisytiharan tersebut dan yang telah menghidupkan semula ESCAR, menjadi tidak berperlembagaan dan tidak sah, oleh itu menjadikan ESCAR tidak sah dan tidak berperlembagaan, yang menyebabkan perbicaraan perayu-perayu di bawah ESCAR satu pembatalan.

**Diputuskan**, menolak rayuan-rayuan tersebut:

(1) (oleh **Mohamed Dzaiddin Ketua Hakim Negara**, **Abdul Malek Ahmad** dan **Ahmad Fairuz HHMP** bersetuju) Berhubung ketidakpatuhan peraturan 6(2) ESCAR, walaupun peraturan 6(2) memperuntukkan hak tertuduh diberikan rekod prosiding, ketidakpatuhan peruntukan tersebut tidak sepatutnya, dengan sendirinya, diambil untuk membatalkan keseluruhan perbicaraan dengan mengambilkira keadilan kes. Di dalam kes ini, tiada keadilan telah dilaksanakan kerana daripada nota-nota keterangan, hakim perbicaraan telah, pada hakikatnya, memerintahkan agar rekod prosiding majistret tersebut diberikan kepada peguam sebelum bermulanya perbicaraan dihadapkan kepada beliau (lihat ms 569A–B).

(2) (oleh Abdul Malek Ahmad HMP, Mohamed Dzaiddin Ketua Hakim Negara dan **Ahmad Fairuz HMP** bersetuju) Keputusan Peguam Negara untuk mengeluarkan sijil di bawah peraturan 2(2) ESCAR adalah berdasarkan semata-mata atas penghakiman Peguam Negara yang tidak boleh tertakluk kepada satu ujian objektif dan tidak sewajarnya tertakluk kepada kajian semula, sebagaimana yang diputuskan oleh Mahkamah Persekutuan dalam kes *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68. Walaupun kes tersebut melibatkan satu usul untuk satu perintah certiorari, prinsip yang sama terpakai di dalam kes ini, tidak kira sama ada terdapat satu darurat de facto atau sebaliknya (lihat ms 581G–I); *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68 diikut.

(3) (oleh **Ahmad Fairuz HMP**, **Mohamed Dzaiddin Ketua Hakim Negara** dan **Abdul Malek Ahmad HMP bersetuju)**

Hujah peguam bagi pihak perayu-perayu di dalam rayuan pertama yang ESCAR, apabila digunakan terhadap warganegara biasa, telah melanggar perkara-perkara 5 dan 8 Perlembagaan tersebut dan adalah bersifat diskriminasi dan, oleh itu, tidak berperlembagaan adalah, berhubung perkara 8, tanpa merit. Hujah-hujah penolong kanan pendakwa raya bahawa peruntukan saksama perkara 8 adalah tidak muktamad, bahawa ESCAR adalah terpakai ke atas semua orang yang telah melakukan kesalahan keselamatan dan bahawa walaupun ia adalah bersifat diskrimasi ia sama sekali sah berdasarkan pengelasan, telah disokong oleh kes *Datuk Haji Harun bin Haji Idris v PP* [1977] 2 MLJ 155, di mana Mahkamah Persekutuan telah memutuskan bahawa perkara 8 tidak bermaksud yang semua undang-undang perlu 'menggunakan keseragaman ke atas semua orang dalam semua keadaan di mana-mana'. Oleh itu, memandangkan ESCAR beroperasi dengan serupa ke atas semua orang dalam keadaan yang sama (iaitu mereka yang telah melakukan kesalahan keselamatan), peraturan 2(2) ESCAR dengan jelas memperuntukkan panduan untuk mengelaskan kes-kes di mana ESCAR telah digunakan dan peraturan 26 ESCAR memperuntukkan rayuan-rayuan ke pihak berkuasa yang lebih tinggi supaya keputusan-keputusan mahkamah perbicaraan sentiasa terbuka untuk kajian semula, ESCAR tidak boleh, di dalam keadaan ini, tidak berperlembagaan dan tidak sah (lihat ms 593I–594B, 596E); *Datuk Haji Harun bin Haji Idris v PP* [1977] 2 MLJ 155 diikut. Berhubung dakwaan pelanggaran ESCAR terhadap perkara 5 Perlembagaan tersebut, pihak-pihak tersebut tidak mengutarakan persoalan bagaimana ia telah dilanggari dan, di dalam keadaan rayuan-rayuan tersebut, ESCAR tidak boleh dikatakan telah melanggar perkara tersebut (lihat ms 596G).

(4) Peguam bagi pihak perayu-perayu di dalam rayuan kedua telah bersetuju bahawa pengisytiharan Pengisytiharan Darurat pada 15 Mei 1969 telah dibuat oleh Yang di-Pertuan Agong setelah bertindak atas nasihat Kabinet (lihat ms 599B). Konsesi ini, bersama sebab-sebab yang dinyatakan dalam kes-kes India yang dipetik (penghakiman-penghakiamn Mahkamah Agong India mempunyai nilai berpengaruh di Malaysia, terutamanya atas Perlembagaan), menunjukkan hakikat bahawa, berbeza daripada hujah peguam yang terdahulu, penjaga kerajaan boleh wujud di bawah Perlembagaan dan ini sememangnya, pada hakikatnya, wujud pada 15 Mei 1969. Dalam keadaan ini, Pengisytiharan Darurat pada 15 Mei 1969 tidak mungkin tidak berperlembagaan dan tidak sah (lihat ms 600F–H); *Madan Murari v Choudhuri Charan Singh* AIR 1980 Cal 95 and *UNR Rao v Indira Ghandi* AIR 1971 SC 1002 diikut.

(5) Akta Darurat (Kuasa-kuasa Perlu) 1979 telah digubal oleh Parlimen dengan kesan retrospektif dan s 9(1) dengan jelas mengesahkan ESCAR, sebagaimana yang diputuskan oleh

Mahkamah Persekutuan dalam *Teh Cheng Poh v PP* [1979] 2 MLJ 238. Dalam keadaan ini, hujah bahawa ESCAR tidak sah dan tidak berperlembagaan tidak mempunyai apa-apa merit (lihat ms 601H–I, 602B).]

**Notes**

For cases on emergency proclamation, see 3(1) *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1471–1473.

For cases on equal protection of the law, see 3(1) *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1474–1478.

For cases on security cases, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3529–3531.

**Cases referred to**

*Bhagat Singh v King Emperor* (1931) LR 58 IA 169 (refd)
*Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935 (distd)
*Datuk Haji Harun bin Haji Idris v PP* [1977] 2 MLJ 155 (folld)
*Eng Keock Cheng v PP* [1966] 1 MLJ 18 (refd)
*JP Berthelsen v Director-General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134 (refd)
*Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 12 (folld)
*Madan Murari v Choudhuri Charan Singh* AIR 1980 Cal 95 (folld)
*Mahan Singh v Government of Malaysia* [1978] 2 MLJ 133 (refd)
*Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68 (folld)
*N Madhavan Nair v Government of Malaysia* [1975] 2 MLJ 286 (refd)
*Osman & Anor v PP* [1968] 2 MLJ 137 (refd)
*Phang Chi Hock v PP* [1980] 1 MLJ 70 (refd)
*PP v Dato' Yap Peng* [1987] 2 MLJ 311 (refd)
*PP v Mohd Ami bin Mohd Razali* [2000] 4 MLJ 679 (refd)
*PP v Shihabduin & Anor* [1980] 2 MLJ 273 (refd)
*Samsher Singh v State of Punjab* AIR 1974 SC 2192 (refd)
*Savrimuthu v PP* [1987] 2 MLJ 173 (refd)
*Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119 (refd)
*Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187 (refd)
*Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No 2)* [1967] 1 MLJ 46 (refd)
*Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289 (refd)
*Tan Boon Liat @ Alien, Re* [1977] 2 MLJ 108 (refd)
*Teh Cheng Poh v PP* [1979] 1 MLJ 50 (refd)
*Teh Cheng Poh v PP* [1979] 2 MLJ 23 (folld)
*Teh Cheng Poh v PP* [1980] AC 458 (folld)
*UNR Rao v Indira Ghandi* AIR 1971 SC 1002 (folld)

**Legislation referred to**

Emergency (Criminal Trials) Regulations 1964 Schedule
Emergency (Essential Powers) Act 1979
Emergency (Essential Powers) Ordinance No 1 of 1969 s 2(1)
Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 ss 3, 4, 5
Emergency (Public Order & Prevention of Crime) Ordinance 1969 s 6(1), (2)
Essential (Community Self-Reliance) Regulations 1975
Essential (Security Cases) (Amendment) Regulations 1975 regs 5, 6(1), (2), 11(1), 17, 27
Federal Constitution arts 5, 8, 40(1), (2), 43(2), 44, 150(1)(b), (5), (6), 161E(2)
Internal Security Act 1960 s 57(1)(a), (b)
Malaysian Act 1963
Sarawak Constitution 1963 art 41

**Appeal from:** Criminal Trial No 45–34 of 2000 (High Court, Kuala Lumpur) and Criminal Trial No 62–29 of 2000 (Sessions Court, Taiping)

*Kamarul Hisham* (*Surina Suhaimi and M Moganambal* with him) (*Daim & Gamany*) for the appellants in Criminal Appeal No 05–10 of 2000(W).

*Karpal Singh* (*Ramkarpal Singh* with him) (*Karpal Singh & Co*) for the appellant in Criminal Appeal No 05–11 of 2000(W).

*Mohd Yusof Hj Zainal Abiden* (Senior Deputy Public Prosecutor) (*Salehudin Saidin*, Deputy Public Prosecutor with him) for the respondent in Criminal Appeals No 05–10 of 2000(W) and No 05–11 of 2000(W).

**Mohamed Dzaiddin Chief Justice.** : These two appeals, heard together and the subject of one judgment, were from the decision of Zulkefli J, who dismissed the preliminary objections raised by the appellants in the criminal trials in the High Court below.

The facts of the case are set out in the judgment of my learned brother Ahmad Fairuz FCJ and there is no need for me to repeat them except to recap the preliminary issues raised by counsel on behalf of the appellants before the learned trial judge.

In Appeal No 05–10–2000(W), they raised the following issues:

(1) The Essential (Security Cases) (Amendment) Regulations 1975 ('ESCAR') is invalid and unconstitutional, and therefore the trial under ESCAR is invalid and unconstitutional.

(2) The trial under ESCAR is invalid for non-compliance with reg 6(2) of ESCAR, ie the record of proceedings were not supplied to the appellants before the trial.

In Appeal No 05–11–2000(W), the issues were:

(1) ESCAR, pursuant to which the appellant is being tried, is invalid on the ground that the reg 26 of ESCAR speaks of a right to appeal to

Federal Court and it later provides the right of appeal to a court, to wit the Supreme Court, which is no longer in existence.

(2) The Proclamation of Emergency by the Yang di-Pertuan Agong was invalid on the ground that the Yang di-Pertuan Agong did not act on the advice of the Cabinet as required by art 40(1) of the Federal Constitution ('the Constitution'). If that Proclamation was invalid, the Emergency (Essential Powers) Act 1979, which resurrected ESCAR following it being declared invalid and unconstitutional by the Privy Council in *Teh Cheng Poh v PP* [1979] 1 MLJ 50, was itself unconstitutional and invalid, thus rendering ESCAR still invalid and unconstitutional leading to the commencement and continuing of the trial of the appellants being a nullity.

I have had the advantage of reading in draft the grounds of judgments of my learned brothers, Abdul Malek FCJ and Ahmad Fairuz FCJ. For reasons they have given, I, too, would dismiss these appeals.

In addition to the judgment of my learned brother Dato' Fairuz on the issue of non-compliance with reg 6(2) of ESCAR, I would like to express the following opinion.

Regulation 6(2) of ESCAR states:

> Where the accused is committed for trial under para (1), he shall be supplied with a copy of the record of proceedings before the committing magistrate.

Regulation 11(1) provides as follows:

> The trial of a security case shall begin with the charge being read and explained to the accused who shall thereupon be asked whether he pleads guilty of the offence charged or claims to be tried.

It is clear from reg 11(1) of ESCAR that the commencement of the trial begins with the charge being read and not when witnesses begin to testify. Notwithstanding the fact that the trial had already commenced and the accused persons were not supplied with a copy of the record of proceedings, I think what remains to be considered is whether the failure to supply the notes to the accused persons renders the trial a nullity. Encik Kamarul Hisham, learned counsel for the appellants, had contended that the trial had already taken place at the time when the preliminary objections were raised and the non-supply of the notes of proceedings rendered the committal unlawful under reg 6(2) of ESCAR.

In my opinion, failure to comply with reg 6(2) of ESCAR does not render the trial a nullity. This is because looking at ESCAR as a whole, it is clear that what is of importance is the justice of the case. Here, I would rely on reg 17, which provides:

> The court shall decide on the guilt or innocence of the accused only at the conclusion of the case for defence, and it shall so decide upon hearing and considering the evidence of both the prosecution and the defence as a whole, having regard to the justice of the case, without regard for the technicalities of the rules of evidence or procedure or for any defect concerning the charge.

No doubt, reg 6(2) of ESCAR provides for the right of the accused to be supplied with the record of proceedings, but to my mind, non-compliance with that provision in itself should not be taken to nullify the whole trial having regard to the justice of the case. In the instant case, I am satisfied no injustice has occasioned because from the notes of evidence, the learned trial judge had, in fact, ordered that the record of proceedings of the committing magistrate be given to counsel before the commencement of the trial before him.

For the above reasons, I would, with respect, disagree with En Hisham's contention that the committal of the appellants was unlawful for non-compliance with reg 6(2) of ESCAR.

**Abdul Malek Ahmad FCJ:.** There are two appeals before us which are in essence against the decision of the learned trial judge in dismissing the preliminary objections raised by the appellants. In MPRJ No 05–10–2000(W), Kamarul Hisham Kamaruddin, learned counsel for the appellants, raised four issues.

The two main ones were:

(1) whether the Essential (Security Cases) (Amendments) Regulations 1975 ('ESCAR'), to the extent that it is used against the ordinary citizens, infringes arts 5 and 8 of the Federal Constitution and is, hence, void; and

(2) whether the decision of the Attorney General to issue a certificate under reg 2(2) of ESCAR in the absence of a de facto emergency is unlawful and is, hence, void.

In *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119 ('*Ningkan*'s case'), the petitioner was appointed Chief Minister of Sarawak on 22 July 1963. On 16 June 1966, acting on representations said to have been made to him by the majority of the Council Negri that they had lost confidence in their Chief Minister, the Governor requested the petitioner to resign as Chief Minister. The next day, the Governor purported to dismiss him together with other members of the Council and, in his place, Penghulu Tawi Sli was appointed.

In the earlier case of *Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187, the plaintiff had commenced proceedings against the Governor and the newly appointed Chief Minister, claiming the following reliefs:

(1) a declaration that the Governor acted unconstitutionally when he declared on 17 June that the plaintiff had ceased to hold the office of Chief Minister;

(2) a declaration that the Governor should not have relieved the plaintiff from the office of Chief Minister on the ground of alleged loss of confidence in the plaintiff as Chief Minister;

(3) a declaration that the purported dismissal of the plaintiff by the Governor was ultra vires, null and void;

(4) a declaration that the plaintiff is and has been at all material times the Chief Minister of Sarawak; and

(5) an injunction restraining the second defendant from acting as Chief Minister.

Harley, Acting CJ (Borneo), on 7 September 1966 held that the purported dismissal of the plaintiff by the Governor was ultra vires, null and void and gave judgment as prayed.

On 14 September 1966, the Yang di-Pertuan Agong proclaimed a state of emergency in the State of Sarawak. On 19 September 1966, the Federal Government passed the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 ('the EFCACOS Act') where, among other things, cll (5) and (6) of art 150 of the Constitution were amended to add the words 'or in the Constitution of the State of Sarawak' after the words 'this Constitution'.

The petitioner claimed in *Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No 2)* [1967] 1 MLJ 46 that the proclamation of a state of emergency, being made by the Yang di-Pertuan Agong on the advice of the Federal Cabinet, was null and void in that it was not made bona fide but in fraudem legis and that the EFCACOS Act was on that account null, void and of no effect.

Pike CJ (Borneo) held on 2 December 1966 that an action to declare a federal law invalid required leave of a judge of the Federal Court and by virtue of art 4 of the Constitution, ordered certain paragraphs of the statement of claim, in so far as they alleged the invalidity of the EFCACOS Act, must be struck out. Leave was subsequently given by the Lord President on 20 February 1967 for the institution of proceedings against the Government of the Federation of Malaysia for a declaration that the EFCACOS Act was invalid or that ss 3, 4 and 5 therein were invalid as being ultra vires the Federal Government.

In his petition in *Ningkan*'s case, the petitioner alleged that no grave emergency had arisen in the state of Sarawak which could not be effectively dealt with under the previous Proclamation of Emergency made on 7 September 1964, that the Federal Cabinet well knew that no such emergency existed 'whereby the security or economic life of Sarawak was threatened', that the proclamation was in fraudem legis in that it was made not to deal with grave emergency whereby the security or economic life of Sarawak was threatened, but for the purposes of removing the petitioner from his lawful position as Chief Minister of Sarawak, and that the amendment of cll (5) and (6) of art 150 of the Constitution were null and void as ultra vires the Parliament and contrary, not only to arts 150 and 161E(2) of the Constitution, but also to art 41 of the Sarawak Constitution 1963 and relevant provisions in the Malaysian Act 1963.

It was held by the Federal Court on 1 December 1967 (Barakbah LP and Azmi CJ (Malaya), with Ong Hock Thye FJ dissenting) that it is incumbent on the court to assume that the Government was acting in the best interests of the state and to permit no evidence to be adduced

otherwise. It was also held that the Yang di-Pertuan Agong could decide whether a state of emergency, whereby the security or economic life of the Federation was threatened, existed and that the circumstances which brought about a state of emergency are non-justiciable.

Ong Hock Thye FJ, in dissenting, was of the view that:

(1) the plea on *fraudem legis* was made solely against the Cabinet, upon whose advice the Yang di-Pertuan Agong as a constitutional ruler was bound to act, by virtue of art 40(1) of the Federal Constitution;

(2) Cabinet responsibility for advising a proclamation of emergency was publicly admitted and never disclaimed;

(3) the constitutional position of the Governor General of India under the Government of India Act 1935 was neither comparable with nor similar to that of the Malaysian Cabinet;

(4) art 150 of the Federal Constitution, by specifically providing that the emergency must be one 'whereby the security or economic life of the Federation or of any part thereof is threatened' does not confer on the Cabinet an untrammelled discretion to cause an emergency to be declared at their mere whim and fancy;

(5) the plea raising the question of bona fide involves a question of fact which must be faced;

(6) the crucial question here is whether the proclamation was made not to deal with a grave emergency threatening the security of Sarawak but for the purpose of removing the Chief Minister from office;

(7) even the finding of fact as to the removing the Chief Minister from office is in the affirmative, such objective was not necessarily incompatible with a genuine concern felt by the Cabinet as regards the security situation in Sarawak;

(8) political instability could possibly have serious repercussions on the security of the State;

(9) on the evidence, which included statements by the Deputy Prime Minister and the Minister for Home Affairs, on communist activities in Sarawak, it was impossible to say that the Cabinet advice to the Yang di-Pertuan Agong was not prompted by bona fide considerations of security; for this reason the petititoner had failed to make out a case for holding that the proclamation of emergency was made on *fraudem legis*;

(10) as to the invalidity of ss 3, 4 and 5 of the EFCACOS Act, it may be stated briefly that the overriding consideration of an emergency which justifies an amendment of the Federal Constitution, must no less justify an amendment of the State Constitution, so far as may be strictly necessary.

On appeal to the Privy Council in *Stephen Kalong Ningkan v Government of Malaysia* [1970] AC 379, which is also reported at [1968] 2 MLJ 238, it was held in dismissing it:

(1) that, assuming the issue to be in law justiciable as to whether there had been a true or sufficient emergency, the onus was on the appellant to prove the allegation that there had been no emergency within the meaning of art 150 of the Federal Constitution, and he had failed to do so; it might be accepted that there was no actual or threatened outbreak of violence or breach of the peace, but the word 'emergency' as used in art 150(1) could not be confined to the unlawful use or threat of force in any of its manifestations, and was capable of covering a very wide range of situations and occurrences. The Emergency Proclamation of 14 September 1966 was intra vires and valid; and

(2) that while a proclamation of emergency was in force, subject to cl (6A) of art 150, power was conferred upon the Federal Parliament to make law 'with respect to any matter' if it appeared to Parliament that the law was required by reason of the emergency. The terms of art 41(1) of the 1963 Constitution of Sarawak were sufficiently explicit to make it difficult to construe the Federal Constitution as empowering the Federal Parliament to amend the Constitution of Sarawak permanently and at its pleasure, but a temporary amendment on exceptional grounds stood on a different footing. The EFCACOS Act had the effect of modifying or amending the 1963 Constitution of Sarawak and was intra vires and valid.

It was also held per curiam that whether a proclamation under statutory powers by the Supreme Head of the Federation can be challenged before the courts on some or any grounds is a constitutional question of far-reaching importance which, on the present state of the authorities, remained unsettled and debatable.

In *N Madhavan Nair v Government of Malaysia* [1975] 2 MLJ 286, the applicant had applied for a determination of the validity of the Emergency (Essential Powers) Ordinance No 1 of 1969 ('the 1969 Ordinance') and the Essential (Community Self-Reliance) Regulations 1975 ('the 1975 Regulations'). The 1969 Ordinance as published in the *Gazette* notification did not bear the public seal and did not contain the formula and legend usually appended at the end of such Ordinances.

It was the contention of the applicant that this meant that the Yang di-Pertuan Agong had not consented to the 1969 Ordinance and it had not been properly or at all promulgated and had not the force of law of the land and that the Yang-di Pertuan Agong had no power to make essential regulations. Consequently, he argued that the Prime Minister had no power to make orders under such regulations.

It is also stated in the body of the judgment of Chang Min Tat J (as he then was) that in his affidavit in support, the applicant had made reference to ESCAR and also generally to other regulations made under s 2 of the 1969 Ordinance, which are all invalid and of no consequence but no determination is asked in respect of them and despite the invitation of the learned Senior Federal Counsel to include ESCAR in the determination, he had refused.

The High Court, accordingly, held that although the *Gazette* publication on the face of it lacked authentication, evidence of the due promulgation of the 1969 Ordinance could be proved aliunde. The court was satisfied that the 1969 Ordinance was duly promulgated and had the force of law and, consequently, the 1975 Regulations could be and were validly made by the Yang di-Pertuan Agong.

Specific mention was made of two earlier cases. The first was *Eng Keock Cheng v PP* [1966] 1 MLJ, 18 where the appellant was convicted of offences under s 57(1)(a) and (b) of the Internal Security Act 1960 ('the ISA') and sentenced to death. One of the points raised on appeal was that the procedure adopted by the learned trial judge for the trial was a procedure appearing in the Schedule to the Emergency (Criminal Trials) Regulations 1964 ('the 1964 Regulations') being seemingly the procedure referred to in reg 4 thereof which, in so far as it purports to authorize any one of the many deputy public prosecutors to deprive a man charged with a capital offence of the protection of a preliminary enquiry and of a jury, is ultra vires.

It was argued for the appellant that although it was recited in the Emergency (Essential Powers) Act 1964 ('the 1964 Act') that any regulation made under it shall have effect notwithstanding anything inconsistent therewith contained in any written law other than the 1964 Act, this did not authorise the making of regulations inconsistent with the Constitution as, in the circumstances, the words 'written law' in the Act could not include the Constitution. Alternatively, it was argued that Parliament had exceeded its powers by purporting to delegate to the Yang di-Pertuan Agong power to enact regulations inconsistent with the Constitution.

The Federal Court was of the view that the true effect of art 150 of the Constitution is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution, including the provisions for fundamental liberties, are involved, and that this necessity included authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution.

It was also held that the provisions of the 1964 Act are not beyond the power of Parliament to enact and as Parliament has expressly enacted that regulations made under the Act are to be valid notwithstanding any inconsistency with the provisions of the Constitution, such regulations cannot be challenged on the ground of any such alleged inconsistency.

The second case was *Osman & Anor v PP* [1968] 2 MLJ 137. The appellants were Indonesians convicted for the murder of three civilians in Singapore during the time of confrontation by Indonesia against Malaysia. The Federal Court had dismissed their appeals. In appealing to the Privy Council, one of their arguments was that the 1964 Regulations conflicted with art 8 of the Constitution, and the 1964 Act did not authorize the making of regulations inconsistent with the Constitution.

It was held, in dismissing the appeal, that the phrase 'in any written law' in the 1964 Act included the Constitution and there was nothing in the context requiring an interpretation different from that prescribed in the Interpretation and General Clauses Ordinance 1948.

The attack on the validity of the 1969 Ordinance and the Emergency (Essential Powers) Ordinance No 2 of 1969 ('the 1969 Ordinance No 2') and the regulations made thereunder was revived in *Mahan Singh v Government of Malaysia* [1978] 2 MLJ 133, but it was dropped on appeal to the Privy Council as seen from the passage in Lord Diplock's judgment, which states:

> The appellant's case in the form in which it was presented in those courts included arguments of far-reaching constitutional importance as to the legal relationship between the Government of Malaysia and members of the public services and as to the constitutional validity of the Emergency (Essential Powers) Ordinance Nos 1 and 2 of 1969 and Regulations made thereunder by the Director of Operations. The greater part of the judgments in both courts below, involving many citations from Indian authorities, is devoted to disposing of these arguments. They were rejected by Narain Sharma J. in the High Court, and by all three members of the Federal Court (Suffian LP, Lee Hun Hoe CJ and Ong Hock Sim FJ) before whom the arguments were renewed. Before their Lordships, however, none of these wider propositions was persisted in.

Tan Sri Ong Hock Thye, the former Chief Justice of the High Court of Malaya who was the dissenting judge in *Ningkan*'s case, made a critical examination of the effect of emergency legislation in the context of the Malaysian situation in his article which appeared in Volume IX No 3 of the journal of the Bar Council, called *INSAF*, in December 1976, the article entitled 'Is the 1969 State of Emergency Still an Existing Fact?'.

He wrote:

> What is submitted with respect, however, is that, merely because the Ordinance was lawfully begotten of a proclamation of emergency, it does not necessarily follow that all essential regulations purporting to derive from that Ordinance can claim to be its legitimate issue, unless there is affirmative proof that the putative parent still had a life of its own at the time of conception. Chang Min Tat J did not pause to consider whether there was any such evidence or otherwise. Because he held the Emergency (Essential Powers) Ordinance to have had the force of law in 1969 by virtue of its promulgation, he was satisfied to pronounce, without further ado, that the Essential (Community Self-Reliance) Regulations of 1975 were 'not unconstitutional and not invalid'. By equating 1975 with 1969 — so that what was once essentially a question of fact came to be looked upon later as if it were a conclusion of law — that decision has since become a lodestar, from which any idea of deviation was unthinkable. It would thus seem, from subsequent decisions, to have been assumed, as axiomatic, that once the validity of the 1969 Ordinance was established, the same Ordinance enures for all time, so that s 2 thereof preserves unquestioned forever the powers of the Yang di-Pertuan Agong to make essential regulations for all purposes — come what may in the way of changed circumstances, regardless of whether there be still an emergency or not.

What has been generally overlooked or forgotten was that the Emergency (Essential Powers) Ordinance drew life solely from art 150 of the Constitution, so that it could have no independent existence apart from the state of emergency which brought about its promulgation. In other words, an emergency Ordinance expressly designed for countermeasures dealing with a certain state of emergency arising at a particular point of time cannot possibly be held to have survived, and retained its full force and effect, after the justification for its very existence has disappeared with the passing of the emergency itself. This statement of principle is so manifestly just and right that no authority in support need be cited.'

As regards the third Proclamation of Emergency in 1969, he said:

In a word, the state of emergency which was proclaimed on 15 May 1969 had in due course died a natural death, like its predecessor of the Confrontation era — although, after example of the earlier emergency, no Proclamation was made to mark its obsequies. Indeed, it is strongly to be emphasized that, since February 1971, the Emergency (Essential Powers) Ordinance was, if not dead, at least completely moribund because its s 2 remained sterile and brought forth no essential regulations for several years, whereas, on the other hand, an elected Parliament had during the same period fully resumed its role, rendering emergency rule by the Executive a completely supererogatory usurpation — which in fact was never attempted.

However, on 4 October 1975, out of the blue as it were Gazette Notification PU (A) 320 announced the coming into force of the Essential (Security Cases) Regulations 1975, purporting to have been made under s 2 of the Emergency (Essential Powers) Ordinance No 1 of 1969, by the Yang di-Pertuan Agong. The Emergency (Criminal Trials) Regulations of 1964 could legitimately have been made use of, if so desired — assuming that the Ordinance No 1 of 1969 had not come to the end of its natural life. On that assumption, however, the Minister for Law was minded to go further and introduce radical changes manifestly intended to facilitate proof of guilt and the conviction of persons charged with commission of what came to be categorized as 'Security Offences' — determinable as such at the sole and absolute discretion of the Public Prosecutor. In effect they brought about extensive amendments, over-riding established rules of practice, procedure and evidence which put the defence of an accused person under a severe handicap in the trial of selected criminal cases. By the 1975 Regulations the 1964 Regulations were expressly repealed — obviously for inadequacy.

These Regulations met with strong criticism at the Third Malaysian Law Conference held on 11 October 1975, in deference to which Gazette Notification PU(A) 362 announced that, with effect from 1 November, regs 2–33 inclusive were repealed and substituted as therein set out. In the main, the changes may, not unfairly, be described as of a cosmetic nature, although certain highly objectionable regulations, which more conspicuously made a caricature of the court as Courts of Justice, were eliminated or toned down.

Despite such amendments, however, the regulations still retained much of their Draconian character and, as may be expected, they met with objections by the Bar, whenever the opportunity to do so presented itself. The validity of the Emergency (Essential Powers) Ordinance No 1 of 1969 first came up for determination in the High Court in Kuala Lumpur in November 1975: see *Madhavan Nair v Government of Malaysia* [1975] 2 MLJ 286. The

> issue was raised when the applicant questioned the validity of the Essential (Community Self-Reliance) Regulations 1975. Like the Security Cases Regulations, those regulations were made by virtue of s 2 of the parent Ordinance No 1 of 1969 and it as the applicant's contention that, if the tree fell, so must all the branches debouching from its trunk. In a brilliant judgment Chang Min Tat J held that the issue turned essentially on the proper construction of 'promulgation' in art 150(2) of the Constitution and, being satisfied affirmatively on that point, he pronounced for the validity of those Regulations.
>
> From the Community Self-Reliance Regulations it was but a short step to the Security Cases Regulations. The Penang judge held that, because the 1969 Ordinance had been declared valid, the Security Cases Regulations could not be unconstitutional or invalid. Both Regulations, needless to say, stem from the 1969 Ordinance and drew their validity from it.

He concluded his article by stating:

> A most illuminating parallel to the instant topic of discussion will be found in *Willcock v Muckle* [1951] 2 QB 844, where, upon a case stated by Highgate justices, the Lord Chief Justice, the Master of the Rolls and five other distinguished judges expressed their view on emergency legislation being used for purposes for which the powers given were never intended.

Said Lord Goddard CJ:

> This (National Registration) Act was passed for security purposes; it was never passed for the purposes for which it is now apparently being used. To use Acts of Parliament passed for particular purposes in *wartime when the war is a thing of the past* — except for the technicality that a state of war exists — tends to turn law-abiding subjects into lawbreakers, which is a most undesirable state of affairs.

To which Devlin J (as he then was) added:

> It would be very unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated under different circumstances and for different purposes.
>
> With the above sentiments, upon which I believe all lawyers will heartily agree, I shall close this discussion and leave it to all those in positions of authority to search their own conscience and decide whether or not the 1975 Security Cases Regulations — not to mention the 1969 Proclamations of 'security areas' (under s 47 of the Internal Security Act 1960) extending over the entire territory of Malaysia — may properly be made and invoked for the trial of persons to whom those provisions could not possibly have been intended to apply.

Things took a turn in *Teh Cheng Poh v PP* [1979] 1 MLJ 50. In that case, the appellant had been charged for possession in a security area of a revolver and ammunition under the ISA. The appellant was tried under the special procedure laid down by ESCAR and found guilty and sentenced to death. An appeal to the Federal Court was dismissed and the appellant appealed. Before the Privy Council, three questions of law were argued:

(1) the validity of the ESCAR;

(2) whether the proclamation of the Yang di-Pertuan Agong on 15 May 1969 declaring Malaysia a security area was valid;

(3) the legality under the Federal Constitution of the decision of the Attorney General to prosecute the appellant for an offence under s 57(1) of the ISA.

It was held that:

(1) once Parliament had sat on 20 February 1971, the Yang di-Pertuan Agong did not have any power to make Essential Regulations having the force of law. ESCAR purported to alter in respect of security cases the mode of trial laid down by the Criminal Procedure Code. They are ultra vires the Federal Constitution and for that reason void;

(2) the Proclamation of 15 May 1969 had not been revoked and was therefore still in force; Penang was in a security area; and s 57 of the ISA, which made possession of firearms or ammunition capital offences, was applicable to the possession of firearms or ammunition in Penang;

(3) if indeed the Attorney General was possessed of a discretion to choose between prosecuting the appellant for an offence against s 57(1) of the ISA or for an offence under the Arms Act 1960 and the Firearms (Increased Penalties) Act 1971, there was no material on which to found an argument that in the instant case he had exercised it unlawfully. However, although the Attorney General had a choice whether to charge the appellant with an offence of unlawful possession of a firearm and ammunition at all instead of proceeding with a charge of armed robbery, once he decided to charge the appellant with unlawful possession of a firearm and ammunition he had no opinion but to frame the charge under the ISA;

(4) the provisions of the Arms Act 1960 and the Firearms (Increased Penalties) Act 1971, which deal with the offence of unlawful possession of firearms or ammunition simpliciter, are not applicable where the possession occurs in a security area. The appellant was, therefore, correctly charged in this case;

(5) it follows that the charge against the appellant was good in law but his trial upon such charge was a nullity.

Learned counsel for the appellants argued that the absence of any express reference in ESCAR to the purposes under which the Yang di-Pertuan Agong can validly act upon as expressed in reg 2(2) of the 1969 Ordinance rendered ESCAR void as there would be no legal means of ascertaining if he in fact acted with those purposes in mind and this necessitated a declaration to that effect in the preamble to the ESCAR.

It is not disputed that on 11 December 1978, the Privy Council in *Teh Cheng Poh v PP* declared ESCAR unconstitutional as the Yang di-Pertuan Agong did not have the power to promulgate regulations under art 150(2) of the Constitution after Parliament had sat on 20 February 1971. However, on 26 January 1979, Parliament enacted the Emergency

(Essential Powers) Ordinance 1979 ('the 1979 Ordinance') validating all subsidiary legislation made under the 1969 Ordinance after 20 February 1971 as if the Yang di-Pertuan Agong had promulgated ESCAR under the 1979 Ordinance. By this course of action, ESCAR once again became constitutional and valid.

The passage taken from Lord Diplock's judgment states:

> The power to proclaim an area as security area with the consequences that this will entail is a discretionary one. It is for the Yang di-Pertuan Agong (again, in effect, the Cabinet) to form an opinion whether public security in any area of Malaysia is seriously disturbed or threatened by the causes referred to in the section, and to consider whether in his opinion it is necessary for the purpose of suppressing organized violence of the kind described. But, as with all discretions conferred upon the Executive by Act of Parliament, this does not exclude the jurisdiction of the court to enquire whether the purported exercise of the discretion was nevertheless *ultra vires* either because it was done in bad faith (which is not in question in the instant appeal) or because as a result of misconstruing the provision of the Act by which the discretion was conferred upon him the Yang di-Pertuan Agong has purported to exercise the discretion when the conditions precedent to its exercise were not fulfilled or, in exercising it, he has taken into consideration some matter which the Act forbids him to take into consideration or has failed to take into consideration some matter which the Act requires him to take into consideration.

Section 9 of the 1979 Ordinance reads as follows:

> (1) Every subsidiary legislation whatsoever made or purporting to have been made under the Emergency (Essential Powers) Ordinance, 1969, (hereinafter in this Act referred to as 'the Ordinance') on or after the 20 February 1971, shall be valid and have effect as if the said subsidiary legislation has been made under the appropriate provision of this Act and shall be deemed to have come into force from the date on which the said subsidiary legislation came into force or purported to have come into force under the Ordinance, and shall be read with all such modifications as may be necessary to construe such subsidiary legislation as having been made under this Act.
>
> (2) Any such subsidiary legislation as is referred to in subsection (1) may be amended, modified or repealed as if the same has been made under the appropriate provision of this Act.
>
> (3) Any prosecution instituted, trial conducted, decision or order given, in respect of any person in any court, or any other proceeding whatsoever had, or any other act or thing whatsoever done or omitted to be done, under or by virtue of the Ordinance or any subsidiary legislation whatsoever made or purporting to have been made thereunder is declared lawful and hereby validated.

In view of the earlier *Teh Cheng Poh* appeal in the Privy Council, the Privy Council, after holding that the trial was a nullity as ESCAR was invalid, had remitted the matter back to the Federal Court to decide whether or not to order a new trial. In *Teh Cheng Poh v PP* [1979] 2 MLJ 238, the Federal Court, in relying on s 9 of the 1979 Ordinance, ordered a new trial.

Learned counsel was of the view that a written law which had been held constitutional in certain circumstances may yet be declared unconstitutional when applied to a different set of circumstances as was held in *PP v Dato' Yap Peng* [1987] 2 MLJ 311 and in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289.

Consequently, he submitted that ESCAR, although previously held to be constitutional, when used against ordinary citizens who may be equally tried under ordinary rules of evidence and procedure and in the absence of a de facto emergency, must be discriminatory and therefore unconstitutional as being contrary to arts 5 and 8 of the Constitution.

Learned counsel stressed that despite the fact that the decision of the Attorney General to declare the present case as a security case cannot be subject to judicial review, yet his decision that there is a security threat, being a decision of fact, must in turn depend on the existence of a de facto state of emergency as otherwise it would be meaningless.

Learned Senior Deputy Public Prosecutor, Yusof Zainal Abiden, reiterated that ESCAR does not offend art 8 of the Constitution as that provision does not mean that all laws must apply uniformly to all persons in all circumstances.

He relied on *Datuk Haji Harun bin Haji Idris v PP* [1977] 2 MLJ 155 (*Datuk Harun*'s case), where the same point was raised although in that case the issue was that s 418A of the Criminal Procedure Code ('the CPC'), under the provisions of which the case of the appellant had been transferred from the subordinate court to the High Court for trial, was inconsistent with art 8 of the Constitution and, therefore, unconstitutional and void by virtue of art 4 of the Constitution.

In an illuminating judgment, Suffian LP said at pp 165–166 as follows:

> Doing the best we can, we are of the opinion that the principles relevant to this appeal that may be deduced from the Indian decisions and from consideration of our constitution are these:
>
> 1 The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
>
> 2 The equality provision is qualified. Specifically, discrimination is permitted within cl (5) of art 8 and within art 153.
>
> 3 The prohibition of unequal treatment applies not only to the legislature but also to the executive — this is seen from the use of the words 'public authority' in cl (4) and 'practice' in cl (5)(b) of art 8.
>
> 4 The prohibition applies to both substantive and procedural law.
>
> 5 Article 8 itself envisages that there may be lawful discrimination based on classification — thus Muslims as opposed to non-Muslims (para (b) of cl (5) of art 8); aborigines as opposed to others (para (c)); residents in a particular State as opposed to residents elsewhere (para. (d)); and Malays and natives of Borneo as opposed to others who are not (art 153).
>
> 6 In India the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no

classification, they strike it down. With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, but if it is not, the law is void.

7 In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia & Ors v Shri Justice SR Tendolkar & Ors* AIR 1958 SC 538 provided that:

(i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

The Solicitor-General submits that if the Indian doctrine of classification is to be accepted by our courts, which he argues has not been done, it may be accepted subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature. In our opinion the doctrine of classification should be accepted by our courts, subject to what we said in para 6 above. We adhere to what was said in *Public Prosecutor v Khong Teng Khen* [1976] 2 MLJ 166 at p 170:

> 'The principle underlying art 8 is that a law must operate alike on all persons *under like circumstances*, not simply that it must operate alike on all persons in any circumstances, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation'. (*Kedar Nath v State of West Bengal* AIR 1953 SC 404, 406.)
>
> In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a magistrate's court, others in a sessions court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate art 8. All that art 8

guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.'

As regards the narrower question whether or not the courts should leave it to the legislature alone to go into the reasonableness of the classification, we think that the court should not, that in other words the courts should consider the reasonableness of the classification.

8 Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law. (Minority judgment in *Northern India Caterers (Pte) Ltd v State of Punjab* AIR 1967 SC 1581 and judgment in *M Chhagganlal v Greater Bombay Municipality* AIR 1974 SC 2009.) We think that we should follow the same principle.

9 In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy. (Per Sastri CJ in *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75.)

10 Mere minor differences between two procedures are not enough to invoke the inhibition of the equality clause (per Bhagwati J in *Chhagganlal*).

Having given due consideration to the line of authorities referred, it is my opinion that the answer to the first issue must be a strong 'no' as there cannot be any infringement of arts 5 and 8 of the Constitution in as far as ESCAR is concerned.

As for the issuance of the certificate by the Attorney General under reg 2(2) of ESCAR, the said provision reads:

> Where the commission of any offence against any written law other than ss 57, 58, 59, 60, 61 and 62 of the Internal Security Act 1960, in the opinion of the Attorney-General, affects the security of the Federation, he shall issue a certificate to that effect and the case shall thereupon be dealt with and tried in accordance with these Regulations.

On this point, it has been held by the Federal Court in *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68 per Raja Azlan Shah, Ag LP (as he then was) that it attracts the pure judgment of the Attorney General which cannot be subjected to an objective test and is not accordingly amenable to judicial review. Although that case involved a motion for an order of certiorari, the same principle would apply here, irrespective of whether there is a de facto emergency or otherwise. That

question, therefore, must be answered in the negative.

Learned counsel had two other issues. One was whether the failure of ESCAR in making specific references to the purposes laid out in s 2(1) of the 1969 Ordinance renders the promulgation of ESCAR ultra vires the powers conferred on the Yang di-Pertuan Agong and is, hence, void. This was, however, withdrawn at the time of submissions.

The other is whether the failure to comply with reg 6(2) of ESCAR, that is, the failure to supply the accused persons with a copy of the record of proceedings before the committing magistrate renders the committal, and hence the trial, of the accused person, void.

Regulation 6(2) of the ESCAR states that:

> Where the accused is committed for trial under para (1), he shall be supplied with a copy of the record of proceedings before the committing magistrate.

Regulation 6(1) of the ESCAR reads:

> Where a security case is triable by the High Court, no preliminary enquiry shall be held in respect thereof, and the magistrate before whom the accused is produced shall forthwith commit the accused for trial by the High Court at such place (whether within the same state or not) as the public prosecutor may specify and upon such charge as the public prosecutor may prefer.

Since the magistrate before whom the accused is produced shall forthwith commit the accused for trial by the High Court without the necessity of a preliminary enquiry, it would appear that the record of proceedings would only disclose the fact of the parties appearing and the committal itself. Regulation 6(2) of ESCAR does not say that the appellants shall be provided with a copy of the record of proceedings before the committing magistrate *when* they are committed for trial under reg 6(1) of ESCAR, but rather *where* they are committed for trial as under reg 5 of ESCAR the trial could also be held in the appropriate subordinate court, in which case the supply of the copy of the proceedings would not be necessary.

Therefore, where the trial is to be held in the High Court, it does not mean that the copy of the record of proceedings before the committing magistrate must be supplied there and then. To my mind, it may be supplied at any time thereafter, preferably before the trial commences and definitely before the trial is concluded. In any case, reg 17 of ESCAR provides that the trial shall be decided having regard to the justice of the case, without regard for the technicalities of the rules of evidence or procedure or for any defect concerning the charge. The answer to this question would also, therefore, be in the negative.

Learned counsel for the appellants in MPRJ No 05–11–2000(W) Karpal Singh contended that the learned trial judge was in error in not concluding that there were specific provisions in the Constitution which militated against the Yang di-Pertuan Agong acting personally in declaring a state of emergency and, accordingly, that he was bound to act on Cabinet advice when declaring a state of emergency on 15 May 1969.

Learned counsel reminded us that on the night of the outbreak of the riots on 13 May 1969 in Kuala Lumpur, the then Prime Minister Tunku

Abdul Rahman Alhaj had announced over television, even before constituting his Cabinet, as follows:

> I have no choice now but to declare a state of emergency in Kuala Lumpur and, if necessary, to declare a state of emergency throughout Malaysia.

According to learned counsel, the then Prime Minister must have had second thoughts as it was the Yang di-Pertuan Agong who subsequently declared a state of emergency throughout the country by issuing the proclamation of emergency on 15 May 1969.

Clause (1) of art 150 of the Constitution reads:

> If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a proclamation of emergency making therein a declaration to that effect.

It is relevant to reproduce art 40 of the Constitution:

> (1) In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.
>
> (1A) In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice.
>
> (2) The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say:
>
> (a) the appointment of a Prime Minister;
>
> (b) the withholding of consent to a request for the dissolution of Parliament;
>
> (c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of Their Royal Highnesses, and any action at such a meeting,
>
> and in any other case mentioned in this Constitution.
>
> (3) Federal law may make provision for requiring the Yang di-Pertuan Agong to act after consultation with or on the recommendation of any person or body of persons other than the Cabinet in the exercise of any of his functions other than:
>
> (a) functions exercisable in his discretion;
>
> (b) functions with respect to the exercise of which provision is made in any other article.

The other relevant Constitutional provision is cl (2) of art 43 of the Constitution, which states:

> The Cabinet shall be appointed as follows, that is to say:
>
> (a) the Yang di-Pertuan Agong shall first appoint as Perdana Menteri (Prime Minister) to preside over the Cabinet a member of the House of

Representatives who in his judgment is likely to command the confidence of the majority of the members of that House; and

(b) he shall on the advice of the Prime Minister appoint other Menteri (Ministers) from among the members of either House of Parliament;

but if an appointment is made while Parliament is dissolved a person who was a member of the last House of Representatives may be appointed but shall not continue to hold office after the beginning of the next session of Parliament unless, if he has been appointed Prime Minister, he is a member of the new House of Representatives, and in any other case he is a member either of that House or of the Senate.

The position has been made crystal clear with the lucid judgment of Lord Diplock in *Teh Cheng Poh*'s case, where he said, in declaring ESCAR invalid:

The Security Cases Regulations

In considering the validity of the Regulations it is necessary to bear in mind two dates: 15 May 1969, the date of issue of the Emergency Proclamation, at a time when Parliament was not sitting, and 20 February 1971, when Parliament next sat. During that period, the Yang di-Pertuan Agong is empowered by art 150(2) of the Constitution to 'promulgate ordinances having the force of law, if satisfied that immediate action is required'.

Although this, like other powers under the Constitution, is conferred nominally upon the Yang di-Pertuan Agong by virtue of his office as the Supreme Head of the Federation and is expressed to be exercisable if he is satisfied of a particular matter, his functions are those of a constitutional monarch and except on certain matters that do not concern the instant appeal, he does not exercise any of his functions under the Constitution on his own initiative but is required by art 40(1) to act in accordance with the advice of the Cabinet. So when one finds in the Constitution itself or in a Federal law powers conferred upon the Yang di-Pertuan Agong that are expressed to be exercisable if he is of the opinion or is satisfied that a particular state of affair exists or that particular action is necessary, the reference to his opinion or satisfaction is in reality a reference to the collective opinion or satisfaction of the members of the Cabinet, or the opinion or satisfaction of a particular Minister to whom the Cabinet have delegated their authority to give advice upon the matter in question.

The power to promulgate ordinances having the force of law is expressed to be exercisable only until both Houses of Parliament are sitting. It lapses as soon as Parliament sits. Thereafter while the proclamation of emergency remains in force any further laws required by reason of the emergency are to be made by Parliament in the exercise of the legislative authority of the Federation vested in it by art 44 of the Constitution, but freed by art 150(5) and (6) of many constitutional restrictions upon the legislative powers of Parliament which apply except when a proclamation of emergency is in force. These enhanced legislative powers of Parliament take the place of the power of the Yang di-Pertuan Agong under art 150(2) to promulgate Ordinances having the force of law. Once Parliament has sat after the oroclamation, the power to legislate by Ordinance under art 150(2) does not revive even during periods when Parliament is not sitting, unless and until a new oroclamation of emergency is issued by the Yang di-Pertuan Agong.

Karpal Singh argued that the learned trial judge was wrong in not concluding that the Yang di-Pertuan Agong in promulgating the proclamation of emergency on 15 May 1969 had to act on Cabinet advice as he was a constitutional monarch with no personal prerogative to declare a state of emergency.

He then referred to the passage in the High Court judgment, as reported in *PP v Mohd Amin bin Mohd Razali* [2000] 4 MLJ 679 at pp 692–693, where the learned trial judge said:

> It is also my view that if the court were to agree with the case of *Teh Cheng Poh*, wherein, the Privy Council advised that the power exercisable by the YDPA, must be exercised in accordance with the advice of the cabinet, it is submitted that it is only true in a situation where the Parliament is sitting and the cabinet in existence. In a situation where there is no cabinet to advise the YDPA, then he is expected to act on his own. This is so by drawing an analogy with cl 2(a) of art 40 of the Federal Constitution, wherein the YDPA can act on his own in the appointment of a Prime Minister. Although this cl 2(a) of art 40 expressly provides for the YDPA to act on his own discretion, the absence of such a clause in art 150(1) of the Federal Constitution will not attract the operation of cl 1 of art 40 of the said Constitution, since at that point of time there is no cabinet in existence to advise the YDPA. Similarly in a situation where the Dewan Rakyat is dissolved and the cabinet ceased to exist the YDPA is still empowered to issue a proclamation of emergency independently. To my mind to insist that cl 1 of art 40 to be strictly adhered to in such a situation would render cl (1) of art 150 nugatory. In this respect in my view cl 1 of art 150 of the Federal Constitution has to be given a purposive interpretation because it is enacted to empower the YDPA to issue a proclamation of emergency irrespective of the existence of the Cabinet, as long as the situation warrants for invocation of such a power.

It is not disputed that before the *Teh Cheng Poh* decision it has been said that cl (1) of art 150 of the Constitution indicated that the discretion to declare a state of emergency was personal to the Yang di-Pertuan Agong viewed in the light of the majority decision of the Federal Court in *Ningkan*'s case, which ruled that the Yang di-Pertuan Agong alone could decide whether a state of emergency, whereby the security or economic life of the federation was threatened, existed.

Barakbah LP at p 122 of the judgment stated:

> In my opinion the Yang di-Pertuan Agong is the sole judge and once His Majesty is satisfied that a state of emergency exists it is not for the court to inquire as to whether or not he should have been satisfied.

Azmi CJ (Malaya) said at p 124 of that report as follows:

> In my view therefore notwithstanding the qualifying words the Yang di-Pertuan Agong in exercise of his power under cl (1) of art 150 must be regarded as the sole judge of that. He alone could decide whether a state (of) emergency whereby the security or economic life of the Federation was threatened, did exist.

On the other hand, Ong Hock Thye J at p 125, declared:

> I have had the advantage of reading the judgments of the learned Lord President and the learned Chief Justice of Malaya. With all respect I am

> unable to share their view that, under art 150 of the Federal Constitution, His Majesty the Yang di-Pertuan Agong is 'the sole judge' whether or not a situation calls for a proclamation of emergency, in other words, that 'the circumstances which bring about a proclamation of emergency are non-justiciable.
>
> His Majesty is not an autocratic ruler since art 40(1) of the Federal Constitution provides that 'In the exercise of his functions under this Constitution or federal law the Yang di-pertuan Agong *shall act in accordance with the advice of the Cabinet*' ….

In the same vein, the then Prime Minister, Tun Haji Abdul Razak had affirmed an affidavit in *N Madhavan Nair v Government of Malaysia* saying that he had presented the 1969 Ordinance to the Yang di-Pertuan Agong for his consideration and approval and having considered so and after being satisfied that immediate action was required for securing public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community, the Yang di-Pertuan Agong approved it. Though that case did not deal with the point at hand, it was intended to imply that the Yang di-Pertuan Agong has a personal discretion in the matter and that if he was not personally satisfied that the events called for an emergency, he could refuse to issue a proclamation notwithstanding the advice tendered by the Cabinet.

It is relevant to observe that it must have been the contention of the Government then that it was at the personal discretion of the Yang di-Pertuan Agong to declare a state of emergency as seen from the affidavit of the then Prime Minister, which was tendered in that case to confirm that contention. Article 150 of the Constitution was subsequently amended vide the Constitution (Amendment) Act 1983 (Act A566) to state that it should be to the satisfaction of the Prime Minister instead of the Yang di-Pertuan Agong, which indicated that the earlier Government stand had run into doubtful waters. However, by the Constitution (Amendment) Act 1984 (Act A584), the original provision was restored. The amendment was, therefore, in force only from 16 December 1983 to 20 January 1984.

From the submissions of learned federal counsel in this appeal, despite the attempt to amend the relevant Constitutional provision and then reverting to the status quo, it is apparent that the government is still maintaining that stand which may have influenced the learned trial judge to come to the findings he made.

On the other side of the coin, Pike CJ in *Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No 2)* decided that the Yang di-Pertuan Agong is bound to act on the advice of the Cabinet in such a situation. Similarly, in *N Madhavan Nair v Government of Malaysia*, Chang Min Tat J said:

> As I have earlier shown, executive power is in the hands of the Yang di-Pertuan Agung and his Cabinet. Though the Yang di-Pertuan Agung is with customary and loyal courtesy asked to be pleased to promulgate the ordinance, it is clear that he as the constitutional monarch does not refuse. He has no discretion in the matter but surely the events of those days were clearly

A sufficient and only too apparent to show the necessity for the ordinance without any agreement.

The crucial provision, therefore, would be art 40 of the Constitution, which states that the Yang di-Pertuan Agong must act on the advice of the Cabinet except in the performance of those functions falling under cl (2) thereof
B involving his personal discretion, which does not include the declaration of a state of emergency.

In his book, *Governments & Crisis Powers*, which is a legal study on the use of emergency powers, Cyrus V Das said at p 237 that although a debate had previously ranged on the subject, there can be no doubt now that the Privy Council opinion on the *Teh Cheng Poh* case settles the point firmly that
C the Yang di-Pertuan Agong does not have a personal discretion under art 150(1) but has at all times to act on Cabinet advice.

In *The Constitution of Malaysia Further Perspectives and Developments*, which is a collection of essays in honour of Tun Mohamad Suffian edited by FA Trindade & HP Lee, this point is dealt with at pp 142–143 as follows:

D

> The Privy Council decision has also settled once and for all the debate over whether a personal discretion resides in the Yang di-Pertuan Agong in relation to the issuance of a proclamation of emergency. The debate stemmed from the reference by Lord President Barakbah and Azmi CJ (Malaya) in *Stephen Kalong Ningkan v The Government of Malaysia* to the Yang di-Pertuan Agong as 'the sole judge'. It was also suggested that the words 'if the Yang di-
> E Pertuan Agong is satisfied' in art 150 compel the vesting of a personal discretion in the Yang di-Pertuan Agong. Such a viewpoint was asserted by Hickling. He said:
>
> > '… [T]he importation of a subjective state of mind in this context may well, given the unusual situation contemplated by the Article and the existence of a residue of prerogative powers, enable the Yang di-Pertuan
> > F Agong to legislate by Ordinance, at will: for the article admits that such a method of legislation — which can overrule all provisions of the Constitution — can be adopted by the Yang di-Pertuan Agong, "if [he is] satisfied that immediate action is required". Here, then, is an unlimited power of legislation which could probably never be the subject of successful attack in any court. Such great powers have no doubt been
> > G entrusted to the Yang di-Pertuan Agong, with the certain feeling that … they will be reasonably exercised.'
>
> 'Whether … the Yang di-Pertuan Agong', Hickling added, 'must in exercising his powers under art 150 act on the advice of the Cabinet or a Minister acting under Cabinet authority remains obscure: but the authoritative dicta cited strongly support a personal discretion remaining in him, in relation to the
> H exercise of those constitutional powers requiring as a condition precedent to their exercise a subjective state of mind.' Hickling's assertion has been disputed by Jayakumar. (*Emergency Powers in Malaysia: Can the Yang di-Pertuan Agong Act in His Personal Discretion and Capacity?* (1976) 18 Mal LR 149). The position has been clarified by the following authoritative pronouncements of the Privy Council in *Teh Cheng Poh v PP*.

I It is my considered view, based on the constitutional provisions and the authorities cited, that the Yang di-Pertuan Agong, in acting under cl (1) of art 150 of the Constitution in the position of a constitutional monarch, must

act on the advice of the Cabinet as provided in art 40 of the Constitution. In this regard, I would say the learned trial judge had fallen into error in his reasoning although he eventually came to the right conclusion.

Learned counsel also posed the question as to whether the Constitution contains provisions for the appointment of a caretaker government when the Dewan Rakyat or House of Representatives was dissolved in May 1969 for elections to be held. He added that only the Dewan Rakyat or House of Representatives was dissolved but not the Yang di-Pertuan Agong and the Dewan Negara or Senate, although it takes all three components to form Parliament. As such, he said, a caretaker government could not be constituted under art 43(2) of the Constitution as the Yang di-Pertuan Agong and the Dewan Negara or Senate would never stand dissolved. This argument is totally devoid of merit because if one component of Parliament is dissolved, the whole is automatically dissolved.

Sheridan and Groves in their book, *The Constitution of Malaysia,* at the commentary on art 43 of the Constitution, states at p 89:

> Ministers (other than the prime minister) may normally be drawn from either House of Parliament, but a minister can be appointed while Parliament is dissolved if he was a member of the dissolved lower House. He may, however, continue in office if, in the new Parliament, he is either re-elected or becomes a senator (cl 2)).

It is my view that if the learned counsel was trying to press the point that the Yang di-Pertuan Agong must act on Cabinet advice when acting under art 150 of the Constitution and that during a state of emergency there was no Cabinet to advise him and, thus, the Proclamation of Emergency was void and of no effect, this argument is also devoid of merit, as at all material times there is always a caretaker government to govern the country.

In these circumstances, I would dismiss both the appeals.

**Ahmad Fairuz FCJ.** : There are two appeals before the court. The first (Mahkamah Persekutuan Rayuan Jenayah 05–10–2000(W)) is by Abdul Ghani bin Ali @ Ahmad, Idris bin Anas and Mohd Roshdi bin Yaacub. The second (Mahkamah Persekutuan Rayuan Jenayah 05–11–2000(W)) is by one Mohd Amin bin Mohd Razali (according to the notice of appeal at pp 80–82 of the appeal record). The appeals are directed against the orders of Zulkefli J in dismissing the preliminary objections raised by the appellants.

In the High Court at Kuala Lumpur, the appellants, with 25 others, were charged with waging war against the Yang di-Pertuan Agong, an offence punishable under s 121 of the Penal Code. In their preliminary objections, the appellants contended that ESCAR is not valid and is unconstitutional. Consequently, the trial of the appellants and the 25 others pursuant to and under ESCAR are also invalid. It was further argued by the appellants in the first appeal that the trial was also invalid because reg 6(2) of ESCAR (which requires the accused persons to be supplied with copies of the record of proceedings before the committing magistrate) had not been complied with.

The learned counsel for the appellants in the first appeal ('En Hisham') submitted that the decision of the Attorney General to declare the appellants' case as a security case is a decision of fact. As such, the decision must in turn depend on the existence of a de facto state of emergency. And there is, according to En Hisham, no longer a de facto emergency in existence at the time the appellants were charged. Thus, the Attorney General's decision in the circumstances is utterly meaningless, unlawful and void. In support of his argument, En Hisham referred this court to several passages from an article entitled 'Is the 1969 State of Emergency Still an Existing Fact?' written by Tan Sri Ong Hock Thye, the former Chief Justice, High Court of Malaya, appearing in *INSAF*, Volume IX No 3, December 1976. Suffice for me at this stage to refer to one of those passages which reads:

> Throughout Malaysia, as a whole, life had been fully restored to normal in every way — the Merdeka Football Tournament has again become an annual fixture; horse-racing provides a regular week-end diversion for a multitude of people in Penang, lpoh, Kuala Lumpur; nothing has deterred Cabinet Ministers and other high officials leaving the country at all times for international conferences and other missions, or vacations abroad (which would have been unthinkable during any state of emergency); there have been neither riots nor other disturbances affecting public order and safety, nor organized violence against persons and property — against which contingencies the Internal Security Act of 1960 had already made full and adequate provision. In a word, the state of emergency which was proclaimed on 15 May 1969 had in due course died a natural death, like its predecessor of the Confrontation era — although, after example of the earlier emergency, no Proclamation was made to mark its obsequies.

Encik Hisham then adverted to the dissenting judgment of Ong Hock Thye FJ in *Ningkan*'s case at p 125. Encik Hisham pointed out, in particular to p 126 of the report, wherein the learned Ong Hock Thye FJ said:

> On the other hand, the inbuilt safeguards against indiscriminate or frivolous re-course to emergency legislation contained in art 150 specifically provide that the emergency must be one 'whereby the security or economic life of the Federation or of any part thereof is threatened.' If those words of limitation are not meaningless verbiage, they must be taken to mean exactly what they say, no more and no less, for art 150 does not confer on the Cabinet an untrammeled discretion to cause an emergency to be declared at their mere whim and fancy. According to the view of my learned brethren, however, it would seem that the Cabinet have carte blanche to do as they please — a strange role for the judiciary who are commonly supposed to be bulwarks of individual liberty and the Rule of Law and guardians of the Constitution.

Encik Hisham then quoted a few passages from the judgments of the Lord Scarman and Lord Diplock in the case of *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935 at pp 948, 950 and 951 ('the *Civil Service* case'). What their Lordships stated in those passages can be summarised thus:

(1) powers exercised under a prerogative are not automatically immune from judicial review just because of their prerogative source. The

exercise of such powers is open to judicial review in the same way as a statutory power if the subject matter of the prerogative powers is justiciable;

(2) administrative action is subject to control by judicial review under three heads, ie illegality, irrationality and procedural impropriety.

Finally, En Hisham referred to the case of *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134 wherein the appellant was served with a notice of cancellation of his employment pass. The notice recited, amongst other things, that the appellant's presence in Malaysia was or would be prejudicial to the security of the country. Encik Hisham then read out what Abdoolcader SCJ (delivering the judgment of the Federal Court) said at p 138:

> The position is wholly different in the matter of the instant appeal: we are unable to envisage what dire consequences of catastrophic magnitude would or possibly could have ensued if the appellant had been accorded a right to make representations prior to the contemplate exercise of the power to cancel his employment pass; all that need be given was an opportunity to the appellant to make representations and the question of security would only arise in the event that he sought particulars of the allegations that his presence in the Federation was or would be prejudicial to the security of the country, as in *Ex-parte Hosenball*. We would add that in any event adequate evidence from responsible and authoritative sources would be necessary on the security aspect and no reliance can be placed in that regard on a mere *ipse dixit* of the first respondent to that effect in the notice of cancellation of the employment pass which the learned judge purported to accept without more ado.

In his reply, the learned Senior Deputy Public Prosecutor ('the DPP') did not address himself on the article and cases relied upon by the learned counsel for the appellants in the first appeal. The DPP stressed that the Attorney General's decision was in accordance with reg 2(2) of ESCAR, which was made under the Emergency (Essential Powers) Ordinance No 1 of 1969 (Ordinance 1/69). It was his contention that the Ordinance 1/69 and ESCAR are still valid laws. After referring to arts 150(1), (2), (2B) and (5) of the Constitution, he submitted that the Proclamation of Emergency can still operate even if the emergency ceases to exist. The DPP also pointed out that the section under which the appellants were charged clearly shows that the offence is one that affects the security of Malaysia. Finally, he relied on the case of *PP v Shihabduin & Anor* [1980] 2 MLJ 273 (FC) at p 275 to emphasise the point that the role of the judiciary is confined to ascertaining from the words used by the legislature to express its intention what that intention is.

Reverting now to Ong Hock Thye FJ's judgment in *Ningkan*'s case and his article in *INSAF*, I would, at the outset, refer to the case of *Bhagat Singh v King Emperor* (1931) LR 58 IA 169 (PC), which was referred to by the learned judges of the Federal Court in *Ningkan*'s case. In that case, the Governor-General of India, in the exercise of his powers under s 72 of the Government of India Act, 1935, had promulgated the Lahore Conspiracy Case Ordinance 1930 which transferred trial of a case to a special tribunal.

The petitioners were in fact tried and convicted by this tribunal. It was urged before the Privy Council that the prosecution did not show that any emergency existed and, in fact, there was none. It was further submitted that the Ordinance was not one for peace and good government. On these submissions, the Privy Council said:

> *The petitioners ask this board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a state of emergency exists*. A state of emergency is something that does not permit of any exact definition: It connotes a state of matters calling for drastic action, which is to be judged as such by some one.
>
> *It is more than obvious that that someone must be the Governor-General, and he alone. Any other view would render utterly inept the whole provision*. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the Ordinance.
>
> Yet, if the view urged by the petitioners is right, the judgment of the Governor-General could be upset either (a) by this board declaring that once the Ordinance was challenged in proceedings by way of habeas corpus the Crown ought to prove affirmatively before a court that a state of emergency existed, or (b) by a finding of this board — after a contentious and protracted inquiry — that no state of emergency existed, and that the Ordinance with all that followed on it was illegal.
>
> In fact, the contention is so completely without foundation on the face of it that it would be idle to allow an appeal to argue about it …
>
> It was next said that the Ordinance did not conduce to the peace and good government of British India. The same remark applies. The Governor-General is also the judge of that. The power given by s 72 is an absolute power, without any limits prescribed, except only that it cannot do what the Indian Legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good government of India demands it. (Emphasis added.)

Ong Hock Thye FJ, however, at p 126 of *Ningkan*'s case, pointed out that s 72 'is manifestly not in pari materia with art 150 of the Constitution'. Section 72 reads:

> The Governor-General *may, in cases of emergency*, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian legislature; but the power of making ordinances under this section is subject to the like restrictions, as the power of the Indian legislature to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature and may be controlled or superseded by any such Act. (Emphasis added.)

Article 150(1) of the Constitution, as it was in 1969, reads:

> If the Yang di-Pertuan Agong *is satisfied* that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, whether by war or external aggression or internal disturbance, he may issue a proclamation of emergency. (Emphasis added.)

It is evident they are not in pari materia. Article 150 of the Constitution uses the words 'If the Yang di-Pertuan Agong *is satisfied* that a grave emergency exists …'. Section 72 says 'The Governor-General *may*, in cases of emergency, make and promulgate ordinances …'. If for such wordings like that used in s 72, the Privy Council had said as above-quoted, I am of the view that such wordings as that used in art 150(1) of the Constitution would more than justify that construction as given by the Privy Council. In the circumstances, it is, in my opinion, obvious that Ong Hock Thye FJ's view on the words 'whereby the security or economic life of the federation or of any part thereof is threatened' as in p 126 of *Ningkan*'s case and as quoted in para 3 above, cannot withstand the rationale contained in the above-quoted Privy Council's judgment. What is apparent, therefore, is the fact that the issue of de facto emergency is irrelevant. It is the Yang di-Pertuan Agong alone who decides on the existence of a state of emergency. This is what *Ningkan*'s case held. But it must be noted that *Ningkan*'s case did not decide whether the Yang di-Pertuan Agong could act in his own discretion when exercising his powers under art 150 of the Constitution. Article 40(1) of the Constitution necessitates the Yang di-Pertuan Agong to act on advice of the Cabinet. But this issue was never raised in *Ningkan*'s case and the Federal Court never touched on art 40(1) of the Constitution in its judgments. Anyway, what is more important at this stage is the fact that the Federal Court in its majority judgment in *Ningkan*'s case held that the circumstances which bring about a state of emergency are non-justiciable. In the circumstances, the contention of En Hisham that there must be de facto emergency cannot consequently have any merit.

Moving next to the *Civil Service* case referred to by En Hisham, I note that the Minister for the Civil Service in that case had, pursuant to his powers under art 4 of the Civil Service Order in Council 1982, issued certain oral instruction. The appellants then applied for judicial review of that instruction. The relevant part of that art 4 reads:

> As regards Her Majesty's Home Civil Service — (a) the Minister for the Civil Service *may* from time to time make regulations or *give instructions* … (ii) *for controlling* the conduct of the Service, *and providing* for the classification of all persons employed therein and … The conditions of service of all such persons … (Emphasis added.)

This provision is not in pari materia with reg 2(2) of ESCAR, which reads:

> Where the commission of any offence against any written law other than ss 57, 58, 59, 60, 61 and 62 of the Internal Security Act, 1960, *in the opinion of the Attorney General*, affects the security of the Federation, *he shall issue* a certificate to that effect and the case shall thereupon be dealt with and tried in accordance with these Regulations. (Emphasis added.)

On this reg 2(2), the Federal Court had in 1982 in *Mohamed Nordin bin Johan v Attorney General, Malaysia* held that the regulation is not amenable to judicial review. In the circumstances, En Hisham's reliance on the *Civil Service* case is misplaced.

As to the issue of the appellants not being supplied with a copy of the record of proceedings before the committing magistrate, and thereby contravening reg 6(2) of ESCAR, which reads:

> Where the accused is committed for trial under para (1), he shall be supplied with a copy of the record of proceedings before the committing Magistrate.

Encik Hisham contended that the record should be supplied before the commencement of trial, and the trial, according to reg 11(1) of ESCAR, begins with 'the charge being read and explained to the accused who shall thereupon be asked whether he pleads guilty of the offence charged or claims to be tried.' As the record had not been supplied at all, the committal, according to En Hisham, is thereby rendered unlawful.

The learned DPP, on the other hand, contended that a trial is said to have commenced when evidence has begun to be adduced. He referred us to the Supreme Court decision in the case of *Savrimuthu v PP* [1987] 2 MLJ 173. He further argued that there is nothing in reg 6(2) that stipulates the time when the record of proceedings are to be supplied to the appellants.

On this issue the learned trial judge said:

> … saya memutuskan bahawa sekiranya OKT-OKT berkenaan tidak dibekalkan dengan salinan rekod prosiding tersebut ianya tidak menjejaskan keesahan perbicaraan OKT-OKT di Mahkamah ini … Saya berpendapat OKT-OKT boleh dibekalkan dengan salinan rekod prosiding tersebut pada bila-bila masa sebelum perbicaraan kes ini dimulakan.

I agree with the learned trial judge and the DPP that the record can be given at any time for so long as the appellants are not prejudiced by the non-compliance. As the learned trial judge had, before the start of the recording of evidence of witnesses, ordered that the record be made available to counsel, I cannot see how the appellants in the circumstances had been prejudiced by the non-supply of the record. At the most, in my view, such non-supply of the record at that stage of the proceeding would amount to a mere procedural irregularity which, as pointed out by the learned Chief Justice during the hearing of these appeals, should, as provided by reg 17 of ESCAR be disregarded. Regulation 17 reads:

> The court shall decide on the guilt or innocence of the accused only at the conclusion of the case for the defence, and it shall so decide upon hearing and considering the evidence of both the prosecution and the defence as a whole, having regard to the justice of the case, without regard for the technicalities of the rules of evidence or procedure, or for any defect concerning the charge.

For these reasons, I hold that En Hisham's submission on this issue of non-compliance with reg 6(2) is also without merit.

The last issue raised by En Hisham is on whether ESCAR, when used against ordinary citizens, infringes arts 5 and 8 of the Constitution. He contended that it infringes and, consequently, ESCAR is void. According to En Hisham, ESCAR, when used against ordinary citizens who may be equally tried under ordinary rules of evidence and procedure and in the

absence of de facto emergency, must be discriminatory and, therefore, unconstitutional as being contrary to arts 5 and 8 of the Constitution.

The learned DPP argued that ESCAR applies to all persons who commit security offences. He argued that art 8 is not absolute and does not mean that all laws must apply uniformly to all persons in all circumstances. He stressed that even if ESCAR is discriminatory, it is still lawful as it is based on classification. In support of his contention he referred us to the *Datuk Harun*'s case.

It was contended in *Datuk Harun*'s case that s 418A of the Criminal Prodecure Code ('the CPC') is inconsistent with art 8 of the Constitution and therefore unconstitutional and void by virtue of art 4 of the Constitution. The Federal Court, however, held that the section is not discriminatory. Section 418A of the CPC reads:

> (1) Notwithstanding the provisions of s 417, *the Public Prosecutor* may in any particular case triable by a criminal court subordinate to the High Court *issue a certificate* requiring the court before which the case is pending to remove it to the High Court at such place as may be specified in the certificate and to cause the accused person to appear or be produced before the said High Court.
>
> (2) The power of the Public Prosecutor under sub-s (1) shall be exercised by him personally.
>
> (3) Upon receipt of the certificate, the court before which the case is triable shall without holding a preliminary inquiry under Chapter SVII transmit the case to the High Court mentioned in the certificate and cause the accused person to appear or be brought before such High Court as soon as may be practicable; and thereafter the provisions of *sub-s (3)(b)* and sub-s (4) of *s 417 shall apply* to such case *mutatis mutandis*. (Emphasis added.)

Subsection 3(b) of s 417 reads:

> When the accused person appears or is brought before the High Court in accordance with para (a), it shall fix a date for his *trial* which *shall be held in accordance with the procedure under Chapter XX*. (Emphasis added.)

In s 418A of the CPC, a public prosecutor's certificate would effect a transfer of a case pending in a subordinate court to a High Court and thereafter the trial in the case shall be held in accordance with the procedure under Chapter XX of the CPC. The Attorney General's certificate under reg 2(2), on the other hand, makes an offence under a written law to be a security offence and, thereafter, such offence shall be tried in accordance with ESCAR. Under such circumstances, I agree with the learned DPP that *Datuk Harun*'s case is indeed relevant to the issue raised by En Hisham. It may be pertinent at this juncture to refer to art 8 of the Constitution which states:

> (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race,

descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any Yaw relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

(4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) This article does not invalidate or prohibit:

(a) any provision regulating personal law;

(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion;

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment in any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays.

In this connection, the Federal Court in *Datuk Harun*'s case said at pp 165–166:

> The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
>
> The equality provision is qualified. Specifically, discrimination is permitted within cl (5) of art 8 and within art 153 …
>
> We adhere to what was said in *PP v Khong Teng Khen* at p 170:
>
> > *'The principle underlying art 8 is that a law must operate alike on all persons under like circumstances*, not simply that it must operate alike on all persons in any circumstances, nor that it "must be general in character and universal in application and that the state is no longer to have the power of distinguishing and classifying persons … for the purpose of legislation", *Kedar Nath v State of West Bengal* AIR 1953 SC 404 at p 406.
> >
> > In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a magistrate's court, others in a sessions court, and yet others in the High Court; the law may provide

> that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate art 8. *All that art 8 guarantees is that a person in one class should be treated the same as another person in the same class*, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on …'
>
> Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of case in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law. (Minority judgment in *NI Caterers* and judgment in *M Chhagganlal*). We think that we should follow the same principle. (Emphasis added.)

In the light of what the Federal Court said above, especially the parts emphasised, I agree with the DPP that En Hisham's contention on this issue in relation to art 8 of the Constitution is without merit. Regulation 2(2) requires those who had committed a security offence to be tried in accordance with ESCAR. Thus, ESCAR will operate alike on all persons under like circumstances, ie persons who committed security offences. The class involved here evidently is that class of persons who committed the security offences. Even if ESCAR is considered as a law providing a more drastic and prejudicial procedure as compared to the CPC, I am of the view that reg 2(2) clearly provides the guideline as to the class of cases in which ESCAR is to be resorted to. Furthermore, reg 26 of ESCAR provides for appeals to higher authority so that decisions made by the trial court are always open for review by the higher authority. Hence, ESCAR, in the circumstances, cannot be unconstitutional and invalid.

As both parties had not addressed us on how ESCAR infringes art 5 of the Constitution, I need only say that I cannot see how, in the circumstances of the appeals before us, ESCAR can be said to have infringed that article.

In the second appeal, the learned counsel for the appellant, Mr Karpal Singh, submitted that the learned trial judge was wrong in not concluding that the Yang di-Pertuan Agong, in promulgating the Proclamation of Emergency on 15 May 1969, had to act on Cabinet advice. To support his submission, he referred us to art 40(1) of the Constitution, which reads:

> In the exercise of *his functions* under this Constitution or federal law the Yang di-Pertuan Agong *shall act* in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, *except as otherwise provided by this Constitution*; but shall be entitled, at his request, to any

information concerning the government of the Federation which is available to the Cabinet. (Emphasis added.)

Mr Karpal then adverted to the case of *Teh Cheng Poh v PP* [1980] AC 458, wherein the Privy Council said at p 466:

> In considering the validity of the regulations it is necessary to bear in mind two dates: 15 May 1969, the date of issue of the emergency proclamation, at a time when Parliament was not sitting, and 20 February 1971, when Parliament next sat. During that period, the Yang di-Pertuan Agong is empowered by art 150(2) of the Constitution to '… Promulgate Ordinances having the force of law, if satisfied that immediate action is required'.
>
> Although this, like other powers under the Constitution, is conferred nominally upon the Yang di-Pertuan Agong by virtue of his office as the supreme head of the Federation and is expressed to be exercisable if he is satisfied of a particular matter, his functions are those of a constitutional monarch and, except on certain matters that do not concern the instant appeal, *he does not exercise any of his functions under the Constitution on his own initiative but is required by art 40(1) to act in accordance with the advice of the Cabinet*. So when one finds in the Constitution itself or in a federal law powers conferred upon the Yang di-Pertuan Agong that are expressed to be exercisable if he is of opinion or is satisfied that a particular state of affairs exists or that particular action is necessary, the reference to his opinion or satisfaction is in reality a reference to the collective opinion or satisfaction of the members of the cabinet, or the opinion or satisfaction of a particular minister to whom the cabinet have delegated their authority to give advice upon the matter in question. (Emphasis added.)

Mr Karpal then argued that the trial judge was guilty of a misconception when holding that in a situation where there was no Cabinet to advise the Yang di-Pertuan Agong, he was expected to act on his own. Mr Karpal contended that art 43(2) of the Constitution provides for appointment of members of a caretaker government after Parliament is dissolved. Article 43(2) of the Constitution reads:

> The Cabinet shall be appointed as follows, that is to say —
>
> (a) the Yang di-Pertuan Agong shall first appoint as Perdana Menteri (Prime Minister) to preside over the cabinet a member of the House of Representative who in his judgment is likely to command the confidence of the majority of the members of that House; and
>
> (b) he shall on the advice of the Prime Minister appoint other Menteri (Ministers) from among the members of either House of Parliament;
>
> but if an appointment is made while Parliament is dissolved a person who was a member of the last House of Representatives may be appointed but shall not continue to hold office after the beginning of the next session of Parliament unless, if he has been appointed Prime Minister, he is a member of the new House of Representatives, and in any other case he is a member either of that House or of the Senate.

He then referred to art 44 of the Constitution, which states:

> The legislative authority of the Federation shall be vested in a Parliament, which shall consist of the Yang di-Pertuan Agong and two majlis (Houses of

parliament) to be known as the Dewan Negara (Senate) and the Dewan Rakyat (House of Representatives).

Mr Karpal stressed that Parliament consists of the Yang di-Pertuan Agong, the Senate and the House of Representatives. He then pointed out that art 43(2) of the Constitution uses the words 'while Parliament is dissolved'. As such, he argued, a caretaker government is incapable of being constituted as only the House of Representatives stands dissolved whilst the Senate and the Yang di-Pertuan Agong do not stand dissolved. On that account, he averred that art 43(2) of the Constitution cannot be invoked for the appointment of a caretaker government. In the circumstances, he argued, the Yang di-Pertuan Agong could not have constitutionally promulgated the Proclamation of Emergency on 15 May 1969 and, consequently, the Emergency (Essential Powers) Act 1979 (the 1979 Act) which was enacted by virtue of the proclamation is unconstitutional; accordingly, ESCAR (which were revived by the 1979 Act) are invalid and the appellant's trial a nullity.

In his reply, the DPP referred us to art 40(2) of the Constitution, which reads:

> The Yang di-Pertuan Agong *may act in his discretion in the performance of the following functions*, that is to say —
>
> (a) the appointment of a Prime Minister;
>
> (b) the withholding of consent to a request for the dissolution of Parliament;
>
> (c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of Their Royal Highnesses, and any action at such a meeting,
>
> *and in any other case mentioned in this Constitution.* (Emphasis added.)

The DPP pointed out that art 150(1) of the Constitution (quoted in para 5 above) uses the phrase 'may issue a proclamation of emergency'. He stressed that the operative word in art 150(1 of the Constitution) is 'may' and this is suggestive of it being a discretionary power of Yang di-Pertuan Agong. He then pointed out that *Ningkan*'s case held that the satisfaction of the Yang di-Pertuan Agong in art 150(1) of the Constitution refers to the satisfaction of the Yang di-Pertuan Agong alone. As such, he argued, it naturally follows that the word 'may' which comes after the phrase 'if he is satisfied' also refers to Yang di-Pertuan Agong's discretion alone. Alternatively, the DPP took the view that Yang di-Pertuan Agong needs only act on the advice of the Cabinet when Parliament is not dissolved. In situations where Parliament is dissolved, the personal discretion of Yang di-Pertuan Agong must be implied as at that point of time, there is no Cabinet to advice the Yang di-Pertuan Agong. As a further alternative, the DPP submitted that the Cabinet still existed when Parliament was dissolved in 1969. This is in line with the case of *Madan Murari v Choudhuri Charan Singh* AIR 1980 Calcutta 95, which pointed out that by convention the Government continues in office when Parliament is dissolved. He then adverted to the passages in Dr Cyrus Das' book, which were referred to by Mr Karpal and argued that the passages clearly showed that the then Prime Minister consulted other Ministers before advising the Yang di-Pertuan

Agong to declare the state of emergency on 15 May 1969. Thus, he submitted, the requirement of the Yang di-Pertuan Agong to act on advice pursuant to art 40(1) of the Constitution in issuing the proclamation had been complied with. Hence, according to the DPP, the 1979 Act which validates the Emergency (Essential Powers) Ordinance 1969 and ESCAR is consequently valid and constitutional.

In responding to the DPP's reply and to a question by me, Mr Karpal conceded that the promulgation of the Proclamation of Emergency on 15 May 1969 was made by the Yang di-Pertuan Agong after acting on the advice of the Cabinet. This concession, I believe, had rightly been made in the light of the following passage from the book entitled *May 13 Before & After* by Tunku Abdul Rahman (Utusan Melayu Press, 1969) at pp 98–99:

> I arranged for a special meeting of the senior Ministers of the old Cabinet … I was presiding over an ad hoc Cabinet of 'emergency'. I informed my colleagues of my intentions, the decisions I had arrived at overnight. First of all, I said it was necessary for me to advise His Majesty to proclaim a State of Emergency throughout the country ... That afternoon I summoned the Solicitor-General to my house and drafted with him the various legal notifications to declare a State of Emergency in the country … and that evening I called on His Majesty at the Istana to obtain his Royal signature on all the Proclamations.

(This passage had been cited by Dr Cyrus Das in his book entitled *Governments & Crisis Powers* at p 180). This concession by Mr Karpal must obviously mean that a caretaker government existed when Parliament was dissolved. In this connection, it is now pertinent for me to refer to the case of *Madan Murari v Choudhuri Charan Singh* (referred to us by the DPP). In that case, Sabyasachi Mukharji J, when considering the issue of the exercise of the President's discretion in relation to the granting or refusing of the request for dissolution of Parliament, quoted the following observation of Chief Justice Ray in the case of *Samsher Singh v State of Punjab* AIR 1974 SC 2192 at p 2199:

> This Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British Parliamentary system.

Mukharji J then said, on the same page:

> It is, therefore, material to bear in mind the *conventions* that guide the exercise of discretion in the British Parliamentary System.

At pp 100–101 of the report, he continued thus:

> … In this context, therefore, it may not be inappropriate to refer to certain observations from the *Constitutional and Administrative Law* by SA de Smith (3rd Ed), where the learned author has referred to the conventions of the Constitution and … At p 153, there the author has recognized that *when the Parliament is dissolved the Government continues in office*: it vacates office only if the election results show that it has lost its majority in the House, in which case it must resign. Similarly, reference may be made to O Hood Phillips' *Constitutional and Administrative Law* (6th Ed), where at p 104, the learned

> author has described the nature and purpose of constitutional conventions and at pp 144 and 145 has discussed the conventions regarding the prerogative of dissolution. The petitioner strongly relied on convention (e) at p 145 where it is stated by the learned author that if the Government is defeated in the House of Commons on a motion of confidence or a motion of no confidence, the Prime Minister must either ask for a dissolution or tender resignation of himself and his ministerial colleagues. *Where there is a dissolution which is the usual course, Ministers retain office during the ensuing general election.* (Emphasis added.)

In this connection, the Supreme Court of India in *UNR Rao v Indira Ghandi* AIR 1971 SC 1002 said at p 1003:

> It was said that we must interpret art 75(3) according to its own terms regardless of the conventions that prevail in the United Kingdom. If the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. *But it must be remembered that we are interpreting a Constitution and not an Act of Parliament*, a Constitution which establishes a Parliamentary system of Government with a Cabinet. *In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed.* (Emphasis added.)

In Vol 2 of *Halsbury's Laws of Malaysia*, the learned editors at footnote 3 of para 20.051 at p 48 said:

> Federal Constitution art 43(1). The use of the word 'shall' *in art 43(1) indicates that this is a mandatory provision and that there has to be a Cabinet at all times and that the Yang di-Pertuan Agong cannot dispense with the Cabinet at any point of time, even when Parliament is dissolved.* See *UNR Rao v Indira Gandhi* AIR 1971 SC 1002 (it was argued in this case that there need be no council of Ministers when the House has been dissolved and no House exists, because in such a case, the responsibility of the Ministry to the House cannot be enforced. Rejecting the argument, the Supreme Court said that this proposition would change the entire concept of the Executive. The President cannot exercise the executive power without the aid and advice of the Council of Ministers). See also MP Jain, *Indian Constitutional Law* (1987).

In the light of the reasonings set out in the aforementioned Indian cases and in the light of the fact that judgments of Indian Supreme Court are of persuasive value in Malaysia, particularly on the Constitution (as the Indian Constitution was the model for the Malaysian Constitution) (see *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129), I respectfully agree with the above-quoted view of the editors of *Halsbury's Laws of Malaysia*. As such, a caretaker government can exist under our Constitution and, in fact, did exist on 15 May 1969. In the circumstances, the 15 May 1969 Proclamation of Emergency could not be unconstitutional and invalid.

Moving next to the argument that the Yang di-Pertuan Agong can act in his own discretion when exercising his power under art 150(1) of the Constitution, I need only say that I agree with the learned Dr Cyrus Das when he said (in *Governments & Crisis Powers*, p 237) that there can be no doubt that the Privy Council's 'opinion' in the case of *Teh Cheng Poh v PP* 'settles the point firmly that the Yang di-Pertuan Agong does not have a personal discretion under art 150(1) of the Constitution but has at all times

to act on Cabinet advice'. At this juncture, it may be appropriate to mention that the Privy Council in *Teh Cheng Poh*'s case also held that the Yang di-Pertuan Agong has power under art 150(2) of the Constitution to legislate in an emergency only while Parliament was not sitting. That article reads:

> If a proclamation of emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required.

Parliament sat on 20 February 1971. ESCAR was made by the Yang di-Pertuan Agong on 1 November 1975. It was made in the exercise of powers conferred on the Yang di-Pertuan Agong by s 2 of the Emergency (Essential Powers) Ordinance No 1 1969 ('the No 1 Ordinance'). The material part of that s 2 states:

> (1) Subject to the provisions of this section, the Yang di-Pertuan Agong may make any regulations whatsoever (in this Ordinance referred to as 'Essential Regulations') which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community.
>
> (2) Without prejudice to the generality of the powers conferred by the preceding sub-section, Essential Regulations may, so far as appear to the Yang di-Pertuan Agong to be necessary or expedient for any of the purposes mentioned in that sub-section —
>
> (a) make provisions for the apprehension, trial and punishment of persons offending against the regulations, and for the detention, exclusion and deportation of persons whose detention, exclusion or deportation appears to the Minister for Home Affairs to be expedient in the interests of the public safety or the defence of Malaysia;
>
> (b) create offences and prescribe penalties (including the death penalty which may be imposed for any offence against any written law (including regulations made under this Ordinance);
>
> (c) provide for the trial by such courts as may be specified in such regulations, or persons guilty of any offence against the regulations;
>
> (d) make special provisions in respect of procedure (including the hearing of proceedings in camera) in civil or criminal cases and of the law regulating evidence, proof and civil and criminal liability; …

In the circumstances, the Privy Council also held that the provisions of the No 1 Ordinance that authorise the exercise of the ruler's law-making powers had lapsed when Parliament sat on 20 February 1971 and the Yang di-Pertuan Agong had no power after that date to alter the criminal procedure set out in the CPC. Accordingly, the Privy Council held that ESCAR was ultra vires the Constitution and void, and the defendant's trial was a nullity. After this decision, Parliament enacted the Emergency (Essential Powers) Act 1979 ('the Act'). Section 1(2) of the Act provides that the Act 'shall be deemed for all purposes to have come into force on 20 February 1971'. Section 9(1) of the Act clearly validates with retrospective effect ESCAR. Section 9(1) of the Act reads:

> Every subsidiary legislation whatsoever made or purporting to have been made under the Emergency (Essential Powers) Ordinance, 1969, (hereinafter in this Act referred to as 'the Ordinance') on or after the 20 February 1971, shall be valid and have effect as if the said subsidiary legislation has been made under the appropriate provision of this Act and shall be deemed to have come into force from the date on which the said subsidiary legislation came into force or purported to have come into force under the Ordinance, and shall be read with all such modifications as may be necessary to construe such subsidiary legislation as having been made under this Act.

The Federal Court, in the case of *Teh Cheng Poh v PP*, had also held that ESCAR has been validated by the Act. In the circumstances, the contention that ESCAR is not valid and unconstitutional cannot have any merit.

The last issue taken up by Mr Karpal relates to art 150(8) of the Constitution, which reads:

> Notwithstanding anything in this Constitution —
>
> (a) the satisfaction of the Yang di-Pertuan Agong mentioned in cl (1) and cl (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and
>
> (b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of —
>
> (i) a Proclamation under cl (1) or of a declaration made in such Proclamation to the effect stated in cl (1);
>
> (ii) the continued operation of such Proclamation;
>
> (iii) any ordinance promulgated under cl (2B); or
>
> (iv) the continuation in force of any such ordinance.

Mr Karpal argued that this clause is not retrospective in operation and for the purposes of the Proclamation of Emergency dated 15 May 1969, the clause is irrelevant. He also contended that despite this clause, the court can still consider whether the Yang di-Pertuan Agong had acted constitutionally when promulgating the Proclamation of Emergency of 15 May 1969. He cited the cases of *Re Tan Boon Liat @ Alien* [1977] 2 MLJ 108 and *Phang Chi Hock v PP* [1980] 1 MLJ 70 in support of his contention.

In *Re Tan Boon Liat @ Alien*, the applicants were detained under the Emergency (Public Order & Prevention of Crime) Ordinance 1969. They made representations to the Advisory Board, but the Board failed to make recommendations thereon within three months of the detention orders. Nevertheless, the Yang di-Pertuan Agong had, acting on advice, confirmed the detention orders. The applicants challenged their detention as being unlawful in the light of art 151(l)(b) of the Constitution, which reads:

> Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention … No citizen shall be detained under that law or ordinance for a period exceeding three months unless an advisory board … has considered any representation made by him … and made recommendations thereon to the Yang di-Pertuan Agong.

During the course of the argument before the Federal Court of five judges, reference was made to s 6(1) and (2) of the Emergency (Public Order & Prevention of Crime) Ordinance 1969, which provide:

> (1) Whenever any person has made any representations under s 5(1) to an Advisory Board, the Advisory Board, shall within three months of the date on which such person was detained, consider such representations and make recommendations thereon to the Yang di-Pertuan Agong.
>
> (2) Upon considering the recommendations of the Advisory Board under this section the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every *decision of the Yang di-Pertuan Agong thereon shall*, subject to the provisions of s 7, *be final, and shall not be called into question in any Court*. (Emphasis added.)

When referring to the words emphasized in s 6(2) above, Suffian LP said at p 109:

> As the continued detention after three months was illegal, should this court then order the release of the appellants? Mr Fong submitted not, because (1) it is not disputed that since the commencement of these three cases *the Board had made recommendations* and after considering them His Majesty made his decision thereon, whereupon *the orders of detention* against the appellants *were confirmed*, though it is true *that all these things happened more than three months after the dates of the original orders of detention*, and (2) because *under s 6(2)* of Ordinance 5 *the decision of the Yang di-Pertuan Agong is 'final and shall not be called in question in any Court.' I am of the opinion however that that section applies only to real decisions, not to ultra vires decisions* of His Majesty (see *Anisminic Ltd v Foreign Compensation Commission*) and here clearly His Majesty's decision was ultra vires, and therefore the court is free to order the release of the appellants. (Emphasis added.)

As there was nothing before us to show that the promulgation of the Proclamation of Emergency was in any way ultra vires, I find that Mr Karpal's submission on this issue is without merit. In fact, Dr Cyrus Das' book, at pp 29–30, show that 'riots had broken out even before the Tunku could constitute his new Cabinet' and the Deputy Prime Minister 'was involved in getting the Yang di-Pertuan Agong's signature to the Emergency Ordinance No 1 of 1969 on 15 May 1969'. All these considered with the passage from Tunku Abdul Rahman's book cited above rule out the probability of the Proclamation and the Ordinance No 1 of 1969 being ultra vires.

In the premises and for the reasons given above, I find no cause for any justified complaint by the appellants in these appeals. Accordingly, I dismiss both the appeals.

*Appeals dismissed.*

Reported by Anita Teo